TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 324.

WILLIAM ROBINSON, APPELLANT,

vs.

THE IRON RAILWAY COMPANY, JOHN C. COOMBS, THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, AND THE CENTRAL TRUST COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MAY 13, 1887.

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1-2 *Bill of Complaint.*

3 The Circuit Court of the United States, Southern District of Ohio, Western Division. In Equity.

WILLIAM ROBINSON, Complainant,
vs.
THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY, The Iron Railroad Company, The Iron Railway Company, The Central Trust Company of New York, and John C. Coombs, Respondents. } #3739.

To the judges of the circuit court of the United States for the southern district of Ohio, western division:

William Robinson, of Boston, in the county of Suffolk, in the Commonwealth of Massachusetts, and a citizen of the Commonwealth of Massachusetts, in behalf of himself and all the other holders of the second-mortgage or income bonds of the Iron Railroad Company, a corporation duly organized under the laws of the State of Ohio, who desire to come in and aid in the prosecution of this suit and to contribute to the expenses thereof, brings this his bill of complaint against the defendants, The Toledo, Cincinnati & St. Louis Railroad Company, a corporation duly organized under the laws of the State of Ohio; the above-named Iron Railroad Company, The Iron Railway Company, a corporation purporting to have been organized under the laws of the State of Ohio, all said corporations being citizens of the State of Ohio; and The Central Trust Company of New York, a corporation duly organized under the laws of the State of New York, and a citizen of the State of New York, and John C. Coombs, a citizen of the State of Massachusetts.

And thereupon your orator complains and says that he is holder and owner of twenty-five bonds, of one thousand dollars each, of the defendants, The Iron Railroad Company.

A copy of one of said bonds is hereto annexed, marked
4 "Exhibit A," and made part hereof.

And the complainant says that the amount of said bonded indebtedness of said Iron Railroad Company is five hundred thousand dollars.

And the complainant says that a mortgage was duly made, executed, delivered, and recorded to the defendants, The Central Trust Company of New York, by said Iron Railroad Company to secure said bonds, a copy whereof is hereto annexed and marked "Exhibit B" and made a part hereof.

And the complainant further says that another mortgage to secure another class of bonds was made, executed, delivered, and recorded to the said Central Trust Company of New York at the same date with the making, execution, delivery, and recording of the aforesaid mortgage, a copy of which other mortgage is hereto annexed, with the accompanying bond, which said latter mortgage

was made to secure, marked "Exhibit C," both of which mortgages bear date Aug. 1st, 1881.

And the complainant says that the amount of said latter bonded indebtedness is five hundred thousand dollars.

And the complainant further says that thereafter, to wit, on the first day of October, 1881, the said Iron Railroad Company was consolidated with the Toledo, Delphos & Burlington Railroad Company, a corporation organized under the laws of the State of Ohio, as your *auditor* is informed, by a vote of the stockholders of the Iron Railroad Company, ratified by a vote of the stockholders of the said Toledo, Delphos and Burlington Railroad Company, but whether the same was according to law your orator is ignorant, and the Toledo, Delphos and Burlington Railroad Company continued to operate said road until about the 23rd day of February, 1882, when the said Toledo, Delphos & Burlington Railroad Company became consolidated with the Toledo, Cincinnati & St. Louis Railroad Company, a corporation duly organized under the laws of the State of Ohio.

And thereafter the said Toledo, Cincinnati & St. Louis Railroad Company continued to operate the road of the said Iron Railroad Company until on or about August, 1883, when the same was placed in the hands of a receiver, with the other branches of the said Toledo, Cincinnati & St. Louis Railroad Company, by virtue of proceedings instituted in this court.

And the complainant further says that the amount of the bonded indebtedness of said Iron Railroad Company to secure first-mortgage bonds, so called, was five hundred thousand dollars, and
5 that the rate of interest payable upon the said bonds, evidenced by the coupons annexed thereto, is six per cent. per annum, payable semi-annually, a copy of one of which coupons is hereto annexed, marked "Exhibit D."

And the complainant further says that the earnings of the said Iron railroad from the time of the making and issuing of both said classes of bonds has been at all times sufficient to pay interest upon said first-mortgage bonds and to pay a large interest upon the said second-mortgage or income bonds, to wit:

The net earnings of said railroad in 1881 were forty-one thousand six hundred and ninety-six and twenty-eight one-hundredths ($41,696.28) dollars; the net earnings for 1882 were fifty thousand two hundred and fifty-eight and forty one-hundredths ($50,258.40) dollars, and the net earnings for five months from November 1st, 1883, to April 1st, 1884, were thirty-three thousand seven hundred and sixteen and thirty-seven one-hundredths ($33,716.37) dollars; and the complainant is informed and believes that the earnings from Jan. 1st, 1883, to November 1st, 1883, were in substantially the same proportion as those last alleged.

And the complainant says that the entire sum required to pay the interest upon said first-mortgage bonds was thirty thousand dollars per annum.

And the complainant further says that the earnings during the past two years—during a portion of which time it is alleged that said Iron Railroad Company and Toledo, Cincinnati & St. Louis Rail-

road Company have been in default of interest on the first-mortgage bonds—the net earnings of said Iron railroad, though much more than sufficient to pay the interest upon the first-mortgage bonds, have been abnormally small, as a large number of the blast furnaces which furnish the principal traffic of said railroad have been out of operation by reason of dullness in the iron business, and in good times the earnings would be very much larger.

And the complainant further says that neither the complainant nor those interested in the class of securities owned by him and made the subject of this complaint had any voice whatever in the consolidations heretofore set forth or in either of them, and that no meeting of the said income bondholders was ever called to pass upon the same or to consider it.

6 And the complainant is informed and believes that the trustee under the said mortgage, the defendant, The Central Trust Company of New York, never had legal notice of such consolidation and never assented thereto and had no authority to assent thereto in any way to bind said bondholders.

And the complainant further says, upon information and belief, that the consolidation of said Iron Railroad Company with the Toledo, Delphos & Burlington Railroad Company and the further consolidation of the Iron Railroad Company and the Toledo, Cincinnati & St. Louis Railroad Company were illegal, collusive, fraudulent, and void.

And the complainant further says that neither the board of directors of the said Toledo, Delphos & Burlington Railroad Company, the Toledo, Cincinnati & St. Louis Railroad Company, or of the Iron Railroad Company ever declared a dividend payable to the holders of the second-mortgage or income bonds, though the said division fairly earned the same, so that the bondholders of said class to which the complainant belongs had no opportunity by the terms of their mortgage to enter for breach of condition thereof, and to operate said road for the benefit of securities on that division.

And the complainant further alleges that the earnings of the Iron railroad which ought to have been applied to keep down the interest on its bonds have been largely diverted in consequence of the consolidation of that road with the Toledo, Delphos & Burlington and the Toledo, Cincinnati & St. Louis railroads and applied to pay expenses of said companies, and that they have an equitable lien upon the property of said companies to have refunded the amount of said diverted earnings and to have them applied to pay the interest upon the aforesaid first and second classes of bonds.

And the complainant further says that by the terms of the first mortgage upon the said road the trustees under the same could have entered at any time after the failure to appropriate the earnings to pay the interest and could have had the earnings of said road kept separate, in which event they would have recovered their interest and would have had a surplus to have devoted to the interest of the second-mortgage or income bonds.

And the complainant further says that the said defendants, The Central Trust Company, were trustees under both said mortgages,

to wit, the mortgage to secure the first-mortgage bonds and the mortgage to secure the second-mortgage or income bonds of said Iron Railroad Company, and that the said defendants, The
7 Central Trust Company, were bound to carry out and execute said trust for the benefit of both classes of security holders; but the complainant says that, by reason of the same trustee occupying positions apparently inconsistent, neither the complainant nor any of the holders of bonds of the class which he holds and represents had any fair voice or notice in the proceedings to foreclose and sell said property as hereinafter set forth; and the said defendants, The Central Trust Company, gave no notice to said second-mortgage bondholders or to any of them of the proceedings to foreclose, so that said second-mortgage or income bondholders were absolutely unrepresented in the proceedings and had no opportunity to present to the court the important facts and allegations herein set forth.

And the complainant further says that in or about the month of July, 1883, the said defendant, The Central Trust Company, filed a bill in equity in the United States circuit court for the southern district of Ohio against the Toledo, Cincinnati & St. Louis Railroad Company to foreclose the mortgages upon the property of the Iron Railroad Company, praying for a decree of foreclosure and sale, and thereupon proceedings were duly had, and the defendant, The Toledo, Cincinnati & St. Louis Railroad Company, appeared and answered, admitting default and submitting to decree of foreclosure, and a receiver and special master were duly appointed, and said receiver was ordered by decree of said court to keep a separate account of earnings of each division, which said receiver proceeded to do November 1st, 1883.

And the complainant further says that the said special master, J. D. Cox, finds that the net earnings of said Iron railroad from November 1st, 1883, to April 1st, 1884, a period of five months, was thirty-three thousand seven hundred and sixteen and thirty-seven one-hundredths ($33,716.37) dollars, reference to which report may be had.

And the complainant further says that, notwithstanding the large earnings of said Iron railroad and notwithstanding that the second-mortgage or income bondholders had no notice of said proceedings and were not parties thereto, said proceedings were prosecuted to final decree for foreclosure and sale of said Iron railroad.

And the complainant further says that on or about the fifteenth day of January, 1884, Benjamin F. Guild, William L. Candler, Charles R. Batt, N. S. Mansfield, and James M. Prendergast, all of Boston aforesaid, holders to a greater or less amount, as the complainant is informed and believes, of the first-mortgage bonds of said Iron Railroad Company, became a committee or board of
8 trustees of first-mortgage bondholders of said road under a contract whereby they were to purchase said Iron railroad, with all its property, under and by virtue of said decree for sale when the same would be passed, and all or substantially all of the said first-mortgage bondholders signed the contract with said defendant committee or board of trustees, a copy whereof is hereto annexed,

marked "Exhibit E;" but said second-mortgage or income bondholders had no notice of the same and were not invited to participate in the appointment of said committee or board of trustees.

And the complainant further says that by the terms of said contract, among other things, it is provided as follows:

"Said committee are hereby authorized to negotiate for a participation by the second-mortgage or income bondholders of said Iron railroad in the benefits of the trust herein created upon such terms and to such extent as they may see fit, and may recommend an arrangement to that effect, but the same shall not become a contract or in any respect binding upon said committee, board of trustees, or subscribing bondholders until ratified and adopted by a majority in value of said subscribing bondholders, &c."

And the complainant further says that on or about the 10th day of June, 1884, the holders of the second-mortgage or income bonds of said Iron railroad were called together in Boston and a large number and amount were there represented, and at said meeting a committee of said bondholders was appointed, consisting of William Robinson, Enos C. Soule, Geo. W. Morse, Herbert Steward, and Ellis L. Motte, to confer with the said committee or trustees of the first-mortgage bondholders in regard to a participation in the reorganization and to take such other steps as might be necessary to protect the interest of all said second-mortgage or income bondholders.

And thereafter, to wit, on or about June 19th, 1884, said committee of said second-mortgage bondholders met the said committee or board of trustees of the said first-mortgage bondholders by arrangement, and it was then and there agreed by the said committee or board of trustees of the first-mortgage bondholders that the said second-mortgage bondholders should participate in the reorganization and the benefits to be derived from the foreclosure sale and reorganization of said road; that they should rank in the reorganization substantially as they ranked in the old one, subject to an equitable and fair division of expenses, it being understood that a plan of reorganization should be submitted and that said committee of said first-mortgage bondholders should purchase the property at the coming sale.

9 And the complainant further says that said railroad and property was sold on the 28th of June in pursuance of the decree, and defendant, John C. Coombs, acting for and in behalf of said committee or board of trustees of the first-mortgage bondholders, purchased the same for five hundred thousand ($500,000.00) dollars, as the complainant assumed and had reason to believe, for the benefit of both classes of security holders.

And the complainant further says that said sale was confirmed on the 18th day of July, 1884, and that thereafter, to wit, on the 31st day of July, 1884, the said committee of the second-mortgage bondholders submitted to the committee of the first-mortgage bondholders a plan for reorganization, a copy whereof is hereto annexed marked "Exhibit F," accompanied with a letter, a copy whereof is hereto annexed, marked Exhibit "C."

And the complainant further says that in the meantime the said

committee of the second-mortgage bondholders had received no notice of any name or kind from the committee or board of trustees of the first-mortgage bondholders, and had not even received notice of sale and confirmation thereof or of the amount of expense or of any other thing or any plan of reorganization or of any new organization; but this complainant is informed and believes that immediately after the sale and in some matter preceding said sale of said Iron railroad and its property the said committee or board of trustees of the first-mortgage bondholders proceeded to organize the defendant corporation, The Iron Railway Company, under the laws of Ohio with the intention to transfer said property of the Iron Railroad Company to said new corporation when the sale of the same should be confirmed.

And the complainant further says that said defendant corporation, The Iron Railway Company, is capitalized at six hundred thousand ($600,000) dollars with the purpose of issuing its stock, dollar for dollar, to the first-mortgage bondholders for their bonds and for the amount of their unpaid interest, to wit, interest for two years, and for foreclosure and other expenses, thus practically absorbing the entire capital stock of said defendant corporation without in any way recognizing the rights or interest of said second-mortgage or income bondholders.

And the complainant is informed and believes that said John C. Coombs, acting for and in behalf of said board of trustees or committee of the first-mortgage bondholders, had transferred said property and railroad of said Iron Railroad Company to the defendant, the said Iron Railway Company, in the manner and for the purposes as aforesaid and in fraud of the rights of the complainant and the other second-mortgage or income bondholders of said railroad and in derogation and in fraud of the negotiations which were pending between said committees.

And the complainant further says that said defendant, The Iron Railway Company, is composed of the parties who made up the bondholders of the first-mortgage bonds and the officers thereof and are large holders of first-mortgage bonds, and that no new or innocent party holds the stock thereof, and that both said corporation, the Iron Railway Company, and all the holders of its stock had full notice from the beginning of the rights, claims, and interest of the complainant and of all the second-mortgage or income bondholders.

And the complainant further says that to prevent laches and to protect innocent parties notice of the claims of second-mortgage or income bondholders was published in certain legal newspapers of Boston, in the State of Massachusetts, where both classes of securities are largely or entirely held, a copy of which newspaper articles published August 1st, 2nd, and 3rd, 4th, 5th, 6th, 7th, and 8th are hereto annexed, marked Exhibit "H."

And the complainant further says that the notice of the complainant's claim might be more amply served upon the defendants and notice be more fully given to the public; that the said committee of the second-mortgage or income bondholders served, Aug. 5th, 1884, upon each of the said committee or board of trustees of the first-

mortgage bondholders a notice, a copy whereof is hereto annexed, marked Exhibit "I," and also upon the same date served upon the defendants, The Iron Railway Company, by serving upon its president and treasurer, in the city of Boston, a notice, a copy whereof is hereto annexed, marked Exhibit "J."

And on August 6th, 1884, the said committee caused to be published in two of the principal newspapers of Boston a notice or abstract of said notices "I" and "J;" also a notice signed by a majority of said committee, a copy whereof is hereto annexed, marked Exhibit "K;" all of which notices were served and published before said defendant, The Iron Railway Company, issued the stock.

11 And the complainant further says that in the various statements which appear as a matter of public record the said defendants, The Central Trust Company and The Toledo, Cincinnati & St. Louis Railroad Company, have alleged that the earnings of the Iron Railroad Company were sufficient, if kept separate, to pay the interest on the first-mortgage bonds, reference to which statements may be had in the various foreclosure proceedings instituted in the United States circuit court for the southern district of Ohio by the Central Trust Company against the Toledo, Cincinnati & St. Louis Railroad Company for the foreclosure of the various decisions of said corporation and to the various papers and answers filed in said cases.

And the complainant further says that the said committee of the first-mortgage bondholders have repeatedly stated in a public way that their road was earning sufficient to pay the interest on the first-mortgage bonds, and such claim was made by them and by all that class of bondholders when the defendant, The Toledo, Cincinnati & St. Louis Railroad Company, first ceased to pay interest upon their bonds, but they took no steps to remedy the same.

And the complainant further says that no demand was ever duly made by the holders of the first-mortgage bonds aforesaid for their interest, in accordance with the terms of their mortgage, and no such demand was ever made by the said defendants, The Central Trust Company as trustee.

And the complainant further says that a portion of the property claimed to have been purchased under said decree of foreclosure and sale is covered by the said second mortgage of the Iron Railroad Company and is not covered by the first mortgage, though the same is claimed by the said committee purchasing the same and claimed to have been conveyed to the defendant, The Iron Railway Company.

And the complainant further says that the defendant, The Iron Railway Company, claims that by virtue of said decree of foreclosure and sale and by virtue of said title acquired by said defendant, The Iron Railway Company, from said committee or board of trustees of the first-mortgage bondholders they have acquired a right to the entire income, rents, and tolls, from whatever source, of said Iron Railroad Company and all its property and franchises, though the same may far exceed the sum sufficient to pay the interest upon the first-mortgage bonds aforesaid of said Iron Railroad Company.

12 And the complainant says that there can be no valid decree of foreclosure and sale which will, under any circumstances, deprive the complainant and the class of bondholders whom he represents, to wit, the second mortgage or income bondholders of the Iron Railroad Company, from participating in the net profits and income after the payment of the interest upon the said first-mortgage bonds of the Iron Railroad Company.

And the complainant further says that by the terms of the mortgage to secure said first-mortgage bonds, as well as that to secure the second-mortgage or income bonds, the property, if sold, was to be sold in the city of Ironton, Ohio, and that the same place of sale should have been adopted when sold under decree of the court.

And the complainant further says that the net earnings of the said Iron Railroad Company should have been applied from the time of the appointment of the receiver to pay the interest on said first-mortgage bonds, and the balance should have been left for the subject of an account between the said receiver and the second-mortgage or income bondholders in accordance with the terms of said mortgage.

Wherefore and inasmuch as the complainant and all other said holders of said second-mortgage or income bonds of said Iron Railroad Company who may desire to come in and aid in the prosecution of this suit are without remedy, according to the strict rules of law, and can only have relief in a court of equity where such matters are strictly cognizable, may it please your honors to issue a writ of subpœna to each and all the defendants' commanding them and each of them to answer under oath in the matters and things herein set forth fully and specifically.

And the complainant prays that notice may be issued to all the said second-mortgage or income bondholders that they may come in and aid in the prosecution of this suit, and that their full rights may be preserved in the premises, limiting the time within which they may so appear and fixing the terms and conditions thereof; that the sale of said property, rights, interest, and franchises of the Iron Railroad Company to said committee of the first-mortgage bondholders may be rescinded or so far qualified that it may be declared to be in trust for both classes of bondholders; that the sale to the said Iron Railway Company by said committee or board of trustees of the first-mortgage bondholders be rescinded or be declared to be for the benefit of both classes of bondholders of the said Iron Railroad Company; that an account may be taken of

13 the amount of earnings of the Iron Railroad Company applicable to the payment of interest on its first and second mortgage bonds received since the road was placed in the hands of a receiver, and also that an account may be taken of the amount of earnings diverted by the consolidation prior to the appointment of a receiver and of the amount of property under the control of court which ought in equity to be applied upon said bonds in lieu of said diverted earnings, and that the court will apply the same, first, in payment of the interest now overdue upon the first-mortgage bonds, and after that the balance, if any, of such property in payment of

interest up to the specified rate of interest upon the second-mortgage or income bonds.

And the complainant prays for such other and further relief as justice and equity demands and as to your honors shall seem meet and proper, whether the same is herein specifically prayed for or not.

WILLIAM ROBINSON.

STALLO, KITTREDGE AND WILBY,
GEO. W. MOORE,
Counsel for Complainant.

* * * * * * *

14 EXHIBIT A.

No. —. UNITED STATES OF AMERICA. No. —.

The Iron Railroad Company, incorporated under the laws of the State of Ohio.

$1,000.00. *Income Bond.* $1,000.00.

Total issue, $500,000.

The Iron Railroad Company, a corporation existing under the laws of Ohio, hereby acknowledges itself to be justly indebted to the Central Trust Company of New York or bearer in the sum of one thousand dollars, payable to the legal holder hereof on the first day of July, in the year nineteen hundred and eleven, or, at the option of the said company, on or at any time after the first day of July, A. D. 1886, in lawful money of the United States, at the agency of the company in the city of New York.

The said railroad company doth further promise to pay to the bearer or holder hereof at said agency such interest, in like currency, on the principal of this bond (not, however, to exceed six per cent. in any one year) as the directors of the company shall, annually during the currency of this bond, fix and declare as the year's instalment of interest due and payable out of the net earnings of the lines of railroad belonging to said company.

Such interest instalments shall be fixed and declared by the board of directors of said company in each year hereafter until the maturity hereof, in accordance with the provisions of a certain trust conveyance and agreement, in writing, of even date herewith, executed by the Iron Railroad Company unto the Central Trust Company of New York, as trustee, pledging the line of railroad of such corporation and its net earnings and income, upon certain terms and conditions therein stated, as security for the payment of the principal of this bond, and also such interest thereon as shall be from year to year fixed and declared by the board of directors.

15 It is expressly agreed that the interest hereon is not to be accumulative, and that no interest is, under any circumstances, to be considered to be due and payable, except out of net earnings

applicable to such purpose and when the amount shall have been ascertained and declared by the said board of directors.

When any amount of interest is so fixed it shall be payable as of that year.

Each successive holder hereof accepts this bond subject in all respects to the conditions, terms, and limitations of the trust agreement and conveyance aforesaid between this company and the said Central Trust Company, and waives all right of action against the said railroad company upon this bond, except under and in accordance with the terms of such trust agreement.

And it is expressly agreed between said railroad company and the holder of this bond that no liability hereon shall be enforced against the individual estate of any stockholder by virtue of any law of said State of Ohio.

No bond of this issue shall be valid or obligatory on the said railroad company until duly countersigned by the said trustees.

In witness whereof the said Iron Railroad Company has caused these presents to be signed by its president, sealed with its corporate seal, and attested by the secretary this first day of August, A. D. 1881.

——— ———, *President.*
——— ———, *Secretary.*

Trustees' Certificate.

It is hereby certified that the within bond is one of an issue of 500,000 dollars, equally secured by the trust agreement and conveyance herein recited, which has been duly executed, delivered, and recorded in the proper offices of the counties of Ohio.

CENTRAL TRUST COMPANY
OF NEW YORK, *Trustees,*
By ——— ———, *President.*

16 EXHIBIT "B."

3579.

Trust Deed. The Iron Railroad Co. to the Central Trust Company of New York.

Second mortgage, dated August 1st, 1881, securing $500,000.00 six per cent. income bonds. Filed Aug. 22, 1884. Wm. C. Howard, clerk.

17 This indenture, made this first day of August, A. D. one thousand eight hundred and eighty-one, between the Iron Railroad Company, a corporation duly organized under the laws of the State of Ohio, party of the first part, and the Central Trust Company of New York, party of the second part, witnesseth:

That whereas said party of the first part is a corporation duly organized and existing under the laws of said State of Ohio by vir-

tue of a special act of the General Assembly of said State passed March 7th, 1859 (Ohio Laws, vol. 47, page 160); and

Whereas, by the provisions of said act, said party of the first part is duly authorized and empowered to locate, construct, and operate a railroad from the Ohio river in Upper township, in Lawrence county, in the State of Ohio, to the south line of Jackson county, in said State, which said railroad is now partially built and in operation and is being further constructed, extended, and equipped; and

Whereas said party of the first part has full power and authority, under the laws of said State of Ohio, to provide for borrowing money to further locate, construct, extend, and equip said railroad and to issue its bonds therefor, and for the payment of the same and accruing interest to pledge the entire property, franchises, and net
18 increase of said party of the first part, by mortgage or otherwise; and

Whereas the board of directors of said party of the first part did pass the following resolution:

"Resolved, That, for the corporate purposes of locating, constructing, extending, and equipping its railroad, this company deems it necessary to issue and negotiate and this board hereby authorizes the issue and negotiation of five hundred and twenty-five of the income bonds of this company, to be signed by the president and secretary and duly authenticated by the certificate of the trustee named in the mortgage deed given for their security, four hundred and seventy-five (475) thereof to be for the sum of one thousand dollars ($1,000) each, numbered consecutively from 1 to 475, both inclusive, and fifty (50) thereof to be for the sum of five hundred dollars ($500) each, numbered consecutively from 1 to 50, both inclusive, all bearing date August 1st, 1881, and made payable on the 1st day of July, A. D. 1911, or, at the option of said company, on or at any time after the first day of July, A. D. 1886, to said trustee or bearer, in lawful money of the United States, at the agency of the company, in the city of New York.

Each of said bonds shall also provide for payment to the bearer or holder thereof, at said agency, such interest, in like currency, on the principal of said bond, not, however, to exceed six per cent. in any one year, as the directors of the company shall annu-
19 ally, during the currency of said bonds, fix and declare as the year's installment of interest due and payable out of the net earnings of the lines of railroad belonging to said company; such interest installments to be fixed and declared by the board of directors of this company in each year hereafter until the maturity and payment of said bonds, in accordance with the provision of a certain trust conveyance and agreement in writing, of even date herewith, to be executed by this company unto the said trustee and upon the terms and conditions therein stated.

No such interest is under any circumstances to be due and payable except out of the net earnings applicable to such purpose, and when the amount shall have been ascertained and declared by said board of directors said interest to be non-cumulative, and when the

amount is so ascertained and fixed it shall be payable as of that year.

Each holder of such bonds shall waive all right of action thereon except under and in accordance with the terms of said trust agreement, and expressly waives all liability thereon of the individual estate of any stockholder of this company by virtue of any law of said State of Ohio; none of said bonds to become obligatory until authenticated by said trustee, and, being so authenticated, all of said bonds shall be delivered by the said trustee to said railroad company on the order of its president.

20 A copy of the mortgage herein authorized is recorded on pages — to —, both inclusive, on this record; and

Resolved, further, That for securing the payment of said income bonds and interest a mortgage in the nature of a conveyance in trust be duly executed in the name of this company by its president and secretary to the Central Trust Company of New York as trustee, conveying to it in trust for the purposes aforesaid all the real and personal property of this company, including its franchises and net income, whether the same, all and singular, be now owned or hereafter acquired. Said mortgage shall be subject to the agreement between this company and the Toledo, Delphos and Burlington Railroad Company for track privileges, and so forth, executed the thirtieth day of July, A. D. 1881, and shall contain such provisions, not inconsistent with the foregoing, as the president, by executing, shall approve and adopt."

Which resolution was afterwards, to wit, on the twenty-fifth day of July, A. D. 1881, at a meeting of the stockholders duly called and had, ratified by the unanimous vote of all of the stockholders of said company; and

Whereas said party of the first part, under and in pursuance of said resolution, has executed and issued and now holds to be

21 authenticated and negotiated the aforesaid five hundred and twenty-five income bonds of said company, amounting in the aggregate to five hundred thousand dollars ($500,000) in one series, as above described, and payable and with interest as aforesaid, all being in the following form, except as to numbers and amounts, namely:

No. —. UNITED STATES OF AMERICA. No. —.

The Iron Railroad Company, incorporated under the laws of the State of Ohio.

$1,000. *Income Bond.* $1,000.

Total issue, $500,00–.

The Iron Railroad Company, a corporation existing under the laws of Ohio, hereby acknowledges itself to be justly indebted unto the Central Trust Company of New York or bearer in the sum of one thousand dollars, payable to the legal holder hereof on the first

day of July, in the year nineteen hundred and eleven, or, at the option of said company, on or at any time after the first day of July, A. D. 1886, in lawful money of the United States, at the agency of the company, in the city of New York.

The said railroad company doth further promise to pay to
22 the bearer or holder hereof, at said agency, such interest, in like currency, on the principal of this bond (not, however, to exceed six per cent. in any one year), as the directors of the company shall annually, during the currency of this bond, fix and declare as the year's instalment of interest due and payable out of the net earnings of the lines of railroad belonging to said company. Such interest instalments shall be fixed and declared by the board of directors of said company in each year hereafter until the maturity hereof, in accordance with the provisions of a certain trust conveyance and agreement in writing, of even date herewith, executed by the Iron Railroad Company unto the Central Trust Company of New York, as trustee, pledging the line of railroad of such corporation and its net earnings and income, upon certain terms and conditions therein stated, as security for the payment of the principal of this bond, and also such interest thereon as shall be from year to year fixed and declared by the board of directors. It is expressly agreed that the interest hereon is not to be cumulative, and that no interest is under any circumstances to be considered to be due and payable except out of net earnings applicable to such purpose and when the amount shall have been ascertained and declared by the said board of directors.

When any amount of interest is so fixed it shall be payable as of that year.

23 Each successive holder hereof accepts this bond subject in all respects to the conditions and terms and limitations of the trust agreement and conveyance aforesaid between this company and the said Central Trust Company, and waives all right of action against the said railroad company upon this bond except under and in accordance with the terms of such trust agreement.

And it is expressly agreed between said railroad company and the holder of this bond that no liability hereon shall be enforced against the individual estate of any stockholder by virtue of any law of said State of Ohio.

No bond of this issue shall be valid or obligatory on the said railroad company until duly countersigned by the said trustee.

In witness whereof the said Iron Railroad Company has caused these presents to be signed by its president, sealed with its corporate seal, and attested by the secretary this first day of August, A. D. 1881.

——— ———, *President.*
——— ———, *Secretary.*

Trustees' Certificate.

It is hereby certified that the within bond is one of an issue of

500,000 dollars, equally secured by the trust agreement and
24 conveyance herein recited, which has been duly executed, delivered, and recorded in the proper offices of the counties of Ohio.

CENTRAL TRUST COMPANY OF NEW YORK, *Trustees*,
By —— ——, *President*.

Now, therefore, under the authority, and in order to carry out the purposes and directions aforesaid, and in consideration of the premises and the further sum of one dollar paid to the party of the first part by the party of the second part, the receipt of which is hereby acknowledged, the said party of the first part hath bargained, granted, sold, and conveyed and set over unto the party of the second part, as trustee, and to its lawful successors forever in the said trust, all and singular the said right of way and lines of railroad, as the same now is or may hereafter be constructed, between the Ohio river in Upper township, in Lawrence county, in the State of Ohio, and the south line of Jackson county, in said State, including its line from Ironton to Centre Station, its line from Ironton to Sarah Furnace, its line from Ætna Station to Ellisonville, also the Bartels Branches, all in said Lawrence county, and its appendages and the net income thereof, all subject, however, to the agreement for right of way and use of narrow-gauge track, as provided in the agreement heretofore executed between said mortgagor and the Toledo,
25 Delphos and Burlington Railroad Company, this conveyance being made solely in trust to secure the payment of the principal of said five hundred thousand dollars income bonds and such interest thereupon as may become due thereon, according to the tenor of this instrument, and such net income and earnings hereby pledged and appropriated are to be ascertained and declared by said board according to the following methods and trusts:

First. In each year during the currency of said bonds, beginning with the year 1882, the board of directors of the party of the first part shall, in the month of January, ascertain and declare what amount of net earnings has been made during the preceding fiscal year ending January 1st and is justly applicable to the payment of interest on such issue of income bonds, and in such ascertainment of net earnings there shall be deducted from the gross income all operating expenses, including rebates, taxes, insurance, rents, interest on floating and funding debt and borrowed money, and the payments made on the principal thereof, liabilities for interest on the existing first-mortgage bonds of the party of the first part, the purchase or hire of equipment, together with such expenditures for renewals, repairs, betterments, and increased facilities as may be proper and requisite to put and maintain the line of railroad and all its appendages, buildings, and equipments and terminals
26 in a first-class condition for effective service.

After deducting all such payments, expenses, and liabilities from the amount of gross income received during the year the board of directors shall thereupon ascertain whether any, and, if so,

how much, net income exists which is properly applicable to the payment of interest on the said issue of income bonds. If, on such ascertainment, the said board find that no net income has been realized during the year applicable to such interest payment they shall thereupon enter a resolve to that effect on the journal of their proceedings.

If the said board shall, on such annual ascertainment of revenue, find that a specific sum is available out of the net earnings for such interest payment, then a resolution shall be entered on their journal of proceedings declaring what ascertained sum is properly available out of the year's net earnings for the payment of interest on such income bonds, and the said net income shall be applied to the payment of such interest (but never to exceed six per cent. for any one year) on each such then outstanding income bond.

Thereupon the proper officer or agent of said party of the first part shall give notice, by advertisement in some paper of general circulation in the city of New York, that such payment will be made on the next first day of July on each such outstanding income bond, at the office of the agency of the company, in the city of New
27 York, and the party of the first part agrees and binds itself to promptly furnish its officer or agent with the funds necessary to make such declared payments, and that it will in each year safely set apart and appropriate so much of its net earnings as are properly available for such interest payment as a special trust fund, devoted exclusively to such interest payment, and it will not use the same for any other purpose whatever.

Second. If in any year hereafter the party of the first part shall fail, neglect, or refuse on or before July 1st of the same year to deposit with the agency of the company, in the city of New York, the full sum of money necessary to make such ascertained interest payment the party of the second part shall thereupon have full authority, right, and power, at its discretion, and upon the written request of the holders of a majority of the said income bonds then outstanding it shall be its duty, to forthwith demand, enter, take, and hold possession of all and singular the line of railroad between said points belonging unto the party of the first part, and its equipments and appendages, books, records, and papers, and to operate, manage, and exclusively control the same, through its own officers, agents, and employees, and receive all and singular the toll, income, and revenue thereof until such time as the net earnings thereof shall be sufficient, after the deduction aforesaid for operating
28 expenses, interest on mortgage bonds, taxes, insurance, rental of equipments, renewals, repairs, and betterments; to pay up and discharge all the then arrearages of interest which have been declared on such income bonds, together with interest on such sums from February 1st, when declared, until they are paid, and having fully discharged such arrearages, together with its own reasonable expenses and compensation for such entry and management, the said party of the second part shall thereupon redeliver the said line of railways, its equipments, appendages, books, records, and papers, unto the party of the first part; or, on such default as aforesaid, the

said party of the second part shall have the right and power, at its discretion, and upon the request in writing of the holders of a majority of the bonds then outstanding it shall be its duty, upon being satisfactorily indemnified for so doing, to forthwith institute legal proceedings in any court of competent jurisdiction to procure the appointment of a special receiver of the said line of railroad and its equipments and appendages for the purpose of collecting the income and revenue thereof, and apply the net earnings thereof, after the deductions aforesaid, unto the payment of the arrearages of interest on such income bonds until they are fully paid, together with interest thereon.

And the said party of the first part hereby agrees and binds
29 itself not to resist or deny the right of entry of said party of the second part or the appointment of such receiver, but it hereby fully authorizes the party of the second part, on such default as aforesaid, as its duly constituted agent, to forthwith make entry and take, hold, and possess the said property, using such force as may be necessary to effect such possession.

Third. It is further agreed that in case of any default in the payment of the principal of the said income bonds that the said trustees shall have like powers, duties, and rights, either as to entry or the appointment of a receiver, until the said bonds and expenses and compensations are fully paid, as is herein provided for in case of a default in the payment of interest.

Fourth. In case of the dissolution, incompetency, or resignation of the party of the second part it shall be competent for any court of record in any county where said line of railroad is situated to appoint a substituted trustee on the petition and nomination of the party of the first part, and on such appointment all of the estate, powers, rights, and duties which are herein vested or devolved upon the said party of the second part shall forthwith, without other act or deed, become the estate, rights, powers, and duties of such substituted trustee.

30 And any such trustee shall be entitled to reasonable compensation for any service to be by it performed in execution of the trust hereby created, and shall not be personally liable for the default or misconduct of any agent or employee when selected with reasonable care or for any cause except its own gross negligence or wilful misconduct.

It is further agreed that no income bond shall be valid or entitled to share in such interest payment until the same has been duly authenticated by the signature of such trustee.

Fifth. It is further and expressly stipulated and hereby made one of the terms and conditions of this instrument and as well as of each and every bond secured thereby, as between the said railroad company and the party of the second part, for and on its own behalf as such trustee, as well as on behalf of each and every of the beneficiaries, being each and every one who shall at any time be and become holders of or in any way interested in any of said bonds, that no recourse shall be had to the individual liability of any stockholder of said railroad company for the payment of any of said

bonds, but all such individual liability is expressly waived and released.

31–38 Sixth. It is specifically agreed that this indenture is designed solely for the protection and security of said issue of income bonds, and is made subject to a prior mortgage of five hundred thousand dollars, this day executed; and upon the full payment of the principal of said income bonds and all such interest as may have become payable thereon, then these presents are void; else to remain in full force and effect.

In witness whereof the said Iron Railroad Company, by order of its board of directors, has hereto affixed its corporate seal and caused the same to be signed by its president and secretary, and the trustee has hereto set the hand of its president and affixed its seal the day and year above written.

IRON RAILROAD CO.,
By JNO. M. CORSE, *President.*

Attest:
[SEAL.] HERBERT STEWARD, *Secretary.*

CENTRAL TRUST CO. OF N. YORK,
By H. F. SPAULDING, *President.*

Witnesses:
W. S. BATE.
C. W. LEVEREDGE.

Attest:
[SEAL.] C. H. P. BABCOCK, *Secretary.*

* * * * * * *

39 EXHIBIT "C."

Trust Deed. The Iron Railroad Co. to the Central Trust Company of New York.

First mortgage, dated August 5th, 1881, securing $500,000.00 six per cent. gold bonds. Filed Aug. 22, 1884. Wm. C. Howard, clerk.

40 This indenture, made this fifth day of August, A. D. one thousand eight hundred and eighty-one, between the Iron Railroad Company, a corporation duly organized under the laws of the State of Ohio, party of the — part, and the Central Trust Company of New York, party of the second part, witnesseth:

That whereas said party of the first part is a corporation, duly organized and existing under the laws of said State of Ohio by virtue of a special act of the General Assembly of said State passed March 7th, 1849 (Ohio Laws, vol. 47, p. 160); and

Whereas by the provisions of said act said party of the first part is duly authorized and empowered to locate, construct, and operate a railroad from Ohio river in Upper township, in Lawrence county, in the State of Ohio, to the south line of Jackson county, in said State; which said railroad is now partially built and in operation and is being further constructed, extended, and equipped; and

Whereas said party of the first part has full power and authority under the laws of said State of Ohio to provide for borrowing money to further locate, construct, extend, and equip said road and to issue its bonds therefor, and, for the payment of the same and accruing interest, to pledge the entire property, franchises, and net income of said party of the first part by mortgage or otherwise; and

41 Whereas the board of directors of said party of the first part did, at a meeting thereof duly convened and held, pass the following resolution:

"Resolved, That for the corporate purposes of locating, constructing, extending, and equipping its railroad this company deems it necessary and proper to issue and negotiate and this board hereby authorizes the issue and negotiation of five hundred of the bonds of this company, to be signed by the president and secretary and duly authenticated by the certificate of the trustee named in the mortgage deed given for their security, each to be for the sum of one thousand dollars ($1,000), numbered consecutively from one to five hundred, both inclusive, all bearing date August 5th, 1881, and made payable on the first day of July, A. D. 1901, or, at the option of said company, on or at any time after the first day of July, 1886, to said trustee or bearer, with interest thereon from the first day of July, A. D. 1881, at the rate of six per cent. per annum, payable semi-annually on the first days of January and July of each year, both principal and interest to be payable in gold coin of the United States of America of the present standard of value and fineness, at the agency of this company in the city of New York, U. S. A., or London, England, and having interest coupons attached for the payment of the interest aforesaid, duly signed by the secretary of

42 the company, said bonds containing a proviso that no liability thereon shall be enforced against the individual estates of any stockholder of this company. A copy of the mortgage herein authorized is fully recorded on pages — of this record.

That for securing payment of said bonds, with interest so accruing, a mortgage, in the nature of a conveyance in trust, to be signed by the president of the company under its corporate seal and attested by the secretary and duly acknowledged by said president and secretary in the name and on behalf of the company — to the Central Trust Company of New York, as trustee, conveying to it in trust for the purposes aforesaid all the real and personal property of this company, including its franchises, privileges, tolls, rents, incomes, resources, interests, railroad, road-bed, right of way, leases, depots, lands, appendages, and appurtenances; also its locomotives, cars, rolling stock, and equipment of every kind, whether the same, all and singular, be now owned or hereafter acquired. Said mortgage shall be subject to the agreement between this company and the Toledo, Delphos and Burlington Railroad Company for track privileges, and so forth, executed the fourth day of August, A. D. 1881, and shall contain such provisions, not inconsistent with the foregoing, as the president, by executing, shall approve and adopt."

Which resolution was afterwards, to wit, on the fifth day of

August, A. D. 1881, at a meeting of the stockholders for that
43 purpose duly called and had, ratified by the unanimous vote of all of the stockholders of said company; and

Whereas said party of the first part, under and in pursuance of said resolution, has executed and issued and now holds to be authenticated and negotiated the aforesaid five hundred bonds of the company in one series, as above described, of even date herewith, each for the sum of one thousand dollars and payable on the first day of July, A. D. 1901, or, at the option of said party of the first part, on or at any time after the first day of July, 1886, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July in each year, all of them being in the form following, to wit:

No. —. UNITED STATES OF AMERICA. No. —.

The Iron Railroad Company, incorporated under the laws of the State of Ohio.

$1,000. *First-Mortgage Six Per Cent. Gold Bond.* $1,000.

Know all men by these presents that the Iron Railroad Company, for value received, is indebted to the Central Trust Company
44 of New York or bearer in the sum of one thousand dollars gold coin of the United States of America, which the said Iron Railroad Company promises to pay, as hereinafter provided, at its agency in the city of New York, in gold coin of the United States of America of the present standard of value and fineness, on the first day of July, A. D. 1901, or, at the option of said railroad company, on or at any time after the first day of July, 1886, with interest at the rate of six per cent. per annum from July 1st, A. D. 1881, payable in like coin semi-annually at the place aforesaid on the first days of January and July in each year, as specified in and on presentation of the annexed coupons therefor, until the said principal sum shall be fully paid.

This bond is one of a series amounting in the aggregate to five hundred thousand dollars and consisting of five hundred bonds for one thousand dollars each, numbered consecutively from one to five hundred, both inclusive, all of which are of like tenor and date and payment of which is secured by a first mortgage, bearing date the fifth day of August, A. D. 1881, duly executed and delivered by the Iron Railroad Company of the State of Ohio, United States of America, to the Central Trust Company of New York, conveying the main line of its railroad and all its branches and appurtenances lying and extending from Ironton, Ohio, to the south line of Jack-
son county, and all the depots and real property of said com-
45 pany and all its rolling stock and equipment and the franchises of said company and all else therein described in trust to secure the payment of said bonds and interest.

It is, however, agreed between said company and the holder of this bond that no liability thereon shall be enforced against the in-

dividual estate of any stockholder of said railroad company by virtue of any law of said State, but the same is expressly waived.

This bond shall pass by delivery unless registered on the books of the company, but after registration of ownership, duly certified hereon, no transfer except upon the books of this company shall be valid unless the last registration shall have been to bearer, and this bond shall continue subject to successive registration and transfer to bearer at the option of the holder.

This bond shall not become obligatory upon the company until the certificate endorsed hereon is signed by the trustee.

In witness whereof the said company has caused its corporate seal to be hereto affixed and the same to be attested by the signatures of its president and secretary, and also caused the coupons hereto annexed to be duly numbered and authenticated, this fifth day of August, A. D. one thousand eight hundred and eighty-one.

—— ——, *President.*

—— ——, *Secretary.*

With forty coupons for the semi-annual interest to become
46 due thereon, in the following form, to be attached thereto:

$30. $30.

The Iron Railroad Company will pay to the bearer, at its agency in the city of New York, thirty dollars U. S. gold coin on the first day of January, 1882, being six months' interest upon its first-mortgage bond No. —.

(Signed) HERBERT STEWARD, *Secretary.*

Said coupons differing so as to express the amount, term, and time of payment of each; such issue of bonds to be five hundred bonds of one thousand dollars each, being numbered from number one to five hundred, both inclusive.

And each of which bonds before being issued shall be duly authenticated by said trustee by signing the following certificate on said bond:

Trustees' Certificate.

It is hereby certified that the within bond is one of an issue — 500,000 dollars, equally secured by the trust agreement and conveyance herein recited, which has been duly executed, delivered, and recorded in the proper offices in the counties of Ohio.

CENTRAL TRUST COMPANY
OF NEW YORK, *Trustees,*
By —— ——, *President.*

47 Now, therefore, under the authority and power aforesaid, in order to secure the payment of the principal and interest of said issue of five hundred thousand dollars of bonds, and in consideration of the premises and the further payment by the party of the second part unto the party of the first part of the sum of one

dollar, the receipt of which is hereby acknowledged, the Iron Railroad Company has bargained, sold, granted, conveyed, and confirmed, and by these presents does bargain, grant, sell, convey, and confirm, unto the Central Trust Company of New York and to its successor or successors forever, in trust and for the uses and trusts hereby created, all and singular the right of way and line of railroad of the said party of the first part, as the same now is or may hereafter be constructed, between the Ohio river, in Upper township, in Lawrence county, in the State of Ohio, and the south line of Jackson county, in said State, including its line from Ironton to Centre Station; its line from Ironton to Sarah Furnace; its line from Ætna Station to Ellisonville; also the Bartels Branches, all in said Lawrence county, together with all and singular the right of way, road-bed, made or to be made, its track, laid or to be laid, between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way now or hereafter appertaining unto said described lines of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures now or at any time hereafter held, owned, or acquired by the said party of the first part for use in connection with its lines of railroad aforesaid, and all its depot ground, yards, sidings, turnouts, sheds, machine shops, leasehold rights now and hereafter owned by the said party of the first part in connection with its lines of railroad aforesaid, together with all and singular the powers and franchises thereto belonging, and the tolls, income, and revenue to be levied or derived therefrom, all subject, however, to the agreement for right of way and use of narrow-gauge track as provided in the agreement heretofore executed between said mortgagor and the Toledo, Delphos and Burlington Railroad Company:

48

Provided, however, and this indenture is upon the express condition, that whenever any of the lands or property belonging to the said party of the first part and covered by this mortgage are no longer necessary or convenient for use in connection with said line of railroad the said party of the first part shall have the right to sell and convey the same on such terms as it pleases, free from the lien of these presents, and on demand the said party of the second part shall release the lien of this mortgage upon all the lands so conveyed, but the proceeds of such sale shall be subject to the liens hereby created:

49

To have and to hold the said granted premises and property unto the said party of the second part and its successors forever, in trust, nevertheless, and for the uses and purposes in this indenture expressed—that is to say:

First. If the interest due on any of the above-described issue of bonds and hereby secured shall not be paid by the party of the first part when the same becomes due, and shall so remain in arrears for six months, and after it is actually demanded at the place where the same is payable, as specified in the coupons given to evidence such interest, or in case the principal of said bonds or any of them shall not be paid at their maturity, then it shall be lawful for the party

of the second part or its successors in said trust for the time being, and it shall be the duty of such trustee, upon the request in writing, so to enter of the holders — not less than one-half of the then outstanding bonds of the issue hereby secured, and upon receiving satisfactory indemnity, to forthwith demand, enter, take, and maintain possession of all and singular the railroad, premises, property, and franchises hereby conveyed, and as the attorney-in-fact or agent of said party of the first part, by itself and agents or substitutes duly constituted, have, use, manage, operate, and enjoy the same
50 and each and every part thereof to as full an extent as the said party of the first part might lawfully do, and shall make from time to time all needful repairs, alterations, and additions thereto, and receive all the tolls, income, and revenue thereof, and after deducting the expenses of such use, operation, reasonable repairs, alterations, and additions, and the cost and charges of taking such possession, and fair compensation for the services of such trustee for such taking possession and management while in possession, the said party of the second part or its successor for the time being shall apply the remaining income and revenue arising from the use of said mortgaged property and coming to its hand to the payment of the interest in default and maturing from time to time, satisfying the said coupons in the order of their several maturities, and thereafter apply the residue upon the principal of said then outstanding bonds.

Second. And upon a further trust that if a six months' default shall occur either in the payment of principal or interest of any of the bonds hereby secured, and after such actual demand as aforesaid, then it shall be lawful for said party of the second part or said trustee for the time being, and upon the written request of the holders of a majority in amount of said bonds then outstanding and upon
51 receiving satisfactory indemnity, it shall, with or without entry, as aforesaid, cause all and singular the said premises, railway, and appurtenances, equipment and franchises, hereby conveyed to be sold as an entirety, at public auction, to the highest and best bidder, at the city of Ironton, Ohio, after giving at least sixty days' notice of the time, place, and terms of sale by advertising in a newspaper of general circulation in the city of Ironton and like advertisement in a newspaper of general circulation in the city of New York, and on such sale said party of the second part or the trustee for the time being shall make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof a good and sufficient deed in fee simple conveying the said railroad, property, and franchises so sold, which conveyance shall be a perpetual bar in law and equity against the said party of the first part, its successors and assigns, and all persons claiming or to claim under them of all right, title, interest, or claim of, in, or to the said premises and franchises or any part thereof.

The said party of the second part, after deducting from the proceeds of sale the costs and expenses thereof and a reasonable compensation to said trustee and its attorneys and agents for services in connection therewith, shall apply so much of the proceeds as may

be necessary to the ratable payment of principal and the then
52 accrued interest of all the said bonds, whether the said principal be then due or not, and if any proceeds of such sale remain in its hands after the full payment of the principal and accrued interest of all said bonds, then it shall render and pay over the same to the party of the first part or its successors or assigns.

Third. In case of any taking possession or proceeding to sell the mortgaged premises for default of payment of interest, if the said party of the first part, before the said bonds shall become due and before such sale shall be made, shall pay and satisfy all interest then in arrears on all such outstanding bonds and shall also pay and discharge all costs, expenses, and disbursements and reasonable compensation incurred by reason of such default on possession, then, upon evidence thereof to its satisfaction, the said party of the second part shall thereupon discontinue such proceeding and restore possession of the mortgaged premises to the party of the first part, to be thereafter held subject to these presents in like manner as if such default or entry had not occurred.

Fourth. The said party of the first part expressly covenants and agrees that it will, on demand, from time to time hereafter, execute, acknowledge, and deliver unto the said party of the second
53 part any and all such further and other conveyances and assignments as may be necessary and proper to fully convey to and vest in the party of the second part or the trustees for the time being all such future-acquired depots, grounds, estates, equipments, and property as it may hereafter from time to time purchase for use in and upon its said line of railroad and intended to be hereby conveyed.

And the said party of the first part does still further agree that it will, in case of any default in the payment by it either of the principal or interest of any of its bonds hereby secured, forthwith, upon demand of the party of the second part or the trustee for the time being, surrender the full and peaceable possession of all and singular the premises hereby conveyed or intended to be, including all the real and personal property by it acquired subsequent to the date of these presents for use in connection with its said line of railroad, and will also surrender all books of account, records, and papers used by it in and about the operation thereof; and it further agrees that it will not in case of any such demand, entry, or sale make any resistance or delay thereto or make any application for an injunction or other legal process to stay such proceedings.

54–63 Fifth. It is especially agreed that all of the said bonds to be issued hereunder shall be on an equality so far as regards security for the payment thereof by these presents, notwithstanding the same may be issued at different times, it being intended that this indenture shall operate as a security for all said bonds equally, ratably, and without preference, whether issued at the same or different times.

Sixth. It is agreed that each of the bonds hereby secured shall pass by delivery or by transfer on the books of the party of the first part at its agency in the city of New York after a registration of ownership

in such books and duly certified on the back of any such bond by the transfer agent of the party of the first part.

No transfer thereof shall be valid unless made upon the said books unless the last transfer has been made to bearer, in which event such bond may continue to be transferable by delivery.

Any such bonds shall continue subject to such successive registration and transfers to bearer at the option of the owner.

* * * * * * *

64 EXHIBIT D.

$30. $30.

The Iron Railroad Company will pay to the bearer, at its agency in the city of New York, thirty dollars, U. S. gold coin, on the first day of January, 1882, being six months' interest upon its first-mortgage bond No. —.

(Signed) HERBERT STEWARD, *Secretary.*

65 EXHIBIT E.

Iron railroad of Ohio.

This memorandum of an agreement made and entered into by and between the undersigned, owners of the first-mortgage bonds of the Iron Railroad Company of Ohio in the amount set against their names respectively, witnesseth:

That, in consideration of these presents and the mutual and reciprocal undertaking herein contained, and of one dollar to each of the subscribers hereto paid by the committee and board of trustees herein constituted, the receipt whereof is hereby acknowledged, the said subscribing bondholders severally and respectively promise, covenant, and agree to and with each other and with said committee and board of trustees and their successors in said trust and with a majority of the members thereof for the time being as follows:

On request of said committee, to deposit with and deliver unto the International Trust Company of Boston, Massachusetts, first-mortgage bonds upon said Iron railroad owned by said subscribing bondholders to the amount set against their names respectively as aforesaid, together with all unpaid coupons or scrip representing claims for unpaid interest pertaining to said bonds for the purposes herein set forth; all which bonds and the interests therein represented are to be and become subject to all liability, charges, and expenses incurred by said committee, and may be paid over, surrendered, pledged, or otherwise disposed of in carrying out said purposes, and therefor shall be surrendered or delivered by said International Trust Company to or upon the order or receipt of a majority of said committee or board of trustees for the time being, said International Trust Company to issue to said holders so depositing their said bonds negotiable receipts for the bonds deposited by them respectively, whereby their respective interests, rights, and powers in and under said trusts and under this instrument may be assigned, and any as-

signee thereof may surrender any such receipt to said International Trust Company and receive another in place thereof in his own name, and may have his name recorded as the holder thereof in a book to be kept for that purpose by said trust company.

66 The membership of said committee and board of trustees may be changed and vacancies in the same may be filled by elections on the part of said bondholders, at meetings to be held for that purpose in Boston, Massachusetts, pursuant to calls therefor to be issued by said committee for the time being, mailed not less than forty-eight hours prior to such meetings, postpaid, and addressed according to the best information of said committee, and said committee may call such meetings at any time, and must call the same whenever requested, in writing, to do so by holders of said receipts for said bonds to the amount of $100,000 or more at the par value thereof, and a majority in value of the holders of said receipts present and so voting at any such meeting shall have power and be sufficient to fill vacancies in, remove members of, and elect members to said committee and board of trustees, and to divest those removed of and to vest those elected with all the powers, rights, and interests which pertain to members of said committee and board of trustees as herein provided.

The chairman of said meeting, together with any members of said committee who may be present and desire to serve in such capacity, shall be judges of said election, the decision of a majority of whom shall be final upon the question of the validity of proxies and all other questions touching said election, except that no holder of a receipt shall be entitled to vote, either by himself or by proxy, at any such meeting, except in respect of bonds for which a receipt or receipts have been issued in his own name and whose name shall have been recorded in the book kept by said International Trust Company for such purpose as aforesaid at least forty-eight hours before such meeting.

Said committee and board of trustees, as at any time constituted, shall for the time being have all the rights and powers and be vested with all the interests and property and subject to all the duties herein imposed upon said committee and board of trustees as herein named, but the members thereof shall be liable only for wilful neglect or default, and each only for his own conduct and the consequence thereof and neither for the acts or conduct of another or others of said committee and board of trustees, and any and all acts and things which said committee or board of trustees may do in any manner or at all may be as effectively, authoritatively, and completely done by the concurrence therein of a majority thereof.

67 Such committee and board of trustees may elect such officers of and among themselves and adopt such regulations for their own conduct as they may see fit, and shall keep books or records of their doings, which shall at all seasonable times be open to the inspection of said subscribing bondholders.

Benjamin F. Guild, of said Boston; William L. Candler, of Brookline, Massachusetts; James M. Prendergast, Nathaniel B. Mansfield, and Charles R. Batt, all of said Boston, shall constitute and com-

pose the original or first members of the committee and board of trustees herein provided for the purposes herein contemplated.

Said subscribing bondholders do hereby, jointly and severally, for themselves and their respective representatives and assigns, constitute and appoint said committee and board of trustees and said members thereof and their successors in said trust and the majority of them for the time being their true and lawful attorneys, irrevocable, to prove, secure and control, pay over, surrender, pledge, or otherwise dispose of their said bonds, and all rights, property, privileges, and interest therein represented or pertaining thereto, and particularly to direct the proceedings to foreclose the mortgage securing said bonds independently and any and all other proceedings for or against their said interests in the premises, and to purchase or cause to be purchased said Iron railroad, its franchises, equipment, property, earnings, claims, assets, and appurtenances, at any sale or sales thereof, and to receive assignments, transfers, and conveyances thereof and preserve and operate the same, and to pay, cancel, or surrender said bonds or the proceeds or any part thereof therefor; also to take any and all steps which may be necessary to reorganize or to promote the reorganization of a corporation to operate said railroad and franchises and property, should the same be purchased as aforesaid, in which reorganization said receipt-holders may participate or become entitled to such interests therein as may pertain to said bonds so deposited as herein provided; and also, upon being indemnified for all expense and liability incurred in the premises, to transfer and deliver said railroad and all or any property acquired by them in pursuance of this trust to such reorganized corporation or otherwise, to receive and receipt for so much of the proceeds of any sale or sales of the whole or any part of the property covered by or included in the mortgage securing said bonds as may pertain to the bonds deposited under this agreement, and to pay, cancel, surrender, or reduce said bonds or any part thereof therefor, and, after deducting all expenses and liabilities incurred by them under this trust, to divide and distribute said proceeds to and among said subscribing bondholders and their assigns in the proportion hereinafter mentioned; also to purchase, dispose of, contest, settle,
68 and compromise any claims for, under, or against said Iron railroad or Iron Railroad Company or any of the bonds deposited under this instrument or the interests therein represented of said bondholders in the same, and to appoint attorneys and agents to represent them and said subscribing bondholders or any of them herein, and with power to use the name or names of said subscribing bondholders or any of them in the premises, and to do all other acts and things in and touching the premises as fully, completely, and to the same extent as said subscribing bondholders could do if personally present and acting, all for and on account of said subscribing bondholders, including said committee and their assigns respectively, in the proportion which the bonds and claims for unpaid interest due thereon deposited by each bears to the bonds and claims for unpaid interest due thereon deposited by all the subscribers hereto.

Provided, however, that neither said committee and trustees or their successors in said trust are authorized to create any personal liability on the part of said subscribing bondholders or any of them except as against their said bonds and the interests therein represented, to be deposited as herein provided.

Said committee are hereby authorized to negotiate for a participation by the second-mortgage or income bondholders of said Iron railroad in the benefits of the trust herein created upon such terms and to such extent as they may see fit, and may recommend an arrangement to that effect, but the same shall not become a contract nor in any respect binding upon said committee, board of trustees, or subscribing bondholders until ratified and adopted by a majority in value of said subscribing bondholders and their assigns present at a meeting held pursuant to a call therefor, and to be governed by all provisions hereinbefore set forth for meetings to be held for elections as aforesaid, in which call notice shall be given that such subject will be considered; but when so ratified and adopted the same shall become obligatory upon all said subscribing bondholders and their assigns and the interests herein represented.

This instrument and the provisions hereof are to become obligatory upon all the subscribers hereto and their assigns.

When holders of first-mortgage bonds of said Iron Railroad Company, including the subscription hereto of all or any of said committee or trustees to the amount at the par value thereof, of $250,000.00, shall have subscribed the same, and a majority of said committee and trustees hereinbefore designated by their names shall have signified their acceptance of the trust herein created by their signatures as such trustees upon the back hereof, and thereafterwards, until the 20th day of February, 1884, other first-mortgage bondholders of said Iron Railroad Company shall have the right to become parties to this instrument and share in the benefits
69 herein contemplated upon subscribing hereto and complying with the terms hereof and depositing their said bonds as herein provided, and after said 20th day of February any such bondholders may be admitted to become parties hereto at the option of said committee and board of trustees for the time being upon such terms, in addition to those herein provided, as said committee and board may impose.

This agreement is made subject to the condition that all or any of the provisions and stipulations herein contained are to be considered waived or suspended as often and in so far as may be necessary (if ever so) to preserve the availability of said bonds under the mortgage securing the same; always subject to which provision this instrument and the power and authority herein conferred may be modified or enlarged and new stipulations may be incorporated herein upon a request therefor setting forth all the terms and provisions proposed, in writing, signed by the holders or their assigns of record in the book kept by said International Trust Company, as hereinbefore mentioned, or two-thirds in value of all the bonds deposited under this instrument, and the same shall take effect upon the delivery thereof to said committee and board of trustees.

The invalidity of any signature hereto or any error in good faith made by said committee or trustees or any irregularity of form in the observance hereof is not to invalidate this instrument or its binding effect upon any subscriber hereto or create any liability on the part of said committee or any member thereof.

In witness whereof we, being the said subscribing bondholders, do hereunto set our hands and seals, adopting a common seal, this fifteenth day of January, A. D. 1884.

70 EXHIBIT F.

Proposed Plan for Reorganizing the Iron R. R., to be Issued and Given to 1st-Mortgage Bondholders.

$500,000 1st-mortgage bonds, plus first-mortgage bonds equal to the unpaid coupons up to July 1st, 1884, and first-mortgage bonds for the foreclosure expenses.

$500,000 second-mortgage income bonds, to be issued and given in exchange to present income bondholders.

$225,000 stock, to be issued in $100 shares, to be disposed of as follows:

$500,000 of old stock belongs to this road.

Let this be scaled down to one-quarter, $125,000, and give this to old stockholders *pro rata*.

Had the earnings of the Iron R. R. been properly used, the income bondholders would be entitled to about $35,000 in cash. Against this give the income bondholders $100,000 in stock.

The first bondholders are to have ten votes for each $1,000 bond.

The income bondholders are to have five votes for each $1,000 bond.

The stockholders, of course, are to have one vote for each share of stock.

This plan gives the control of the road to the first bondholders by a considerable majority.

Out of sums of money now due the Iron Division are foreclosure expenses to be paid; balance to go toward paying unpaid interest.

Boston, July 31st, 1884.

71–84 EXHIBIT G.

BOSTON, *July* 31, 1884.

To Messrs. Benjamin F. Guild, William L. Candler, Charles R. Batt, N. B. Mansfield, James M. Prendergast, committee of first-mortgage bondholders of the Iron R. R. Co.

GENTLEMEN: In pursuance of the agreement between you, as a committee of the first-mortgage bondholders, and ourselves, as a committee of the second-mortgage or income bondholders, of the above company, made at our interview some time since, we submit herewith a proposed plan of reorganization, subject, of

course, to such modification and change as may be mutually agreed upon.

Referring to our consultation at the office of John C. Coombes, Esq., and to the understanding arrived at there, viz., that the bondholders whom we represent should rank in the reorganization precisely as they stood in the old company, we beg leave to inquire of your committee what the purpose was in forming a new corporation, which, we understand, has been formed under the laws of Ohio, with a capital stock of $600,000, called the Iron Railway Company.

We fail to see how that organization can be made to conform to the understanding and agreement which we arrived at.

Will you kindly favor us with an early reply to this communication?

Yours respectfully,

WM. ROBINSON,
GEO. W. MORSE,
HERBERT STEWARD,
Majority of Committee of Second-Mortgage Bondholders of Iron R. R.

* * * * * * *

85 BOSTON, *Aug. 4th*, 1884.

The public are hereby notified that the Iron Railway Company, a reorganization of the Iron Railroad Company, so called, organized, as it is presumed, to issue its stock for the first-mortgage bonds of the Iron railroad, a corporation operating a railroad from Ironton, in the State of Ohio, northward, can obtain no legal title to the railroad property or franchise of the Iron railroad, and that proceedings will be instituted to rescind the sale recently made to a committee of the first-mortgage bondholders, which committee, it is presumed, has transferred the said property to said new corporation, or its said property to said new corporation, or is proceeding to do so. Any person purchasing the stock of said newly organized corporation will do so with full notice that the corporation can have no valid title to the railroad or property until the rights of the second-mortgage bondholders are adjusted.

86 & 87 A meeting of the income bondholders of the Iron Division is called at 34 Congress street, room 3, on Friday, to consult for their own protection in the above matter.

Boston Herald, Aug. 5th, 1884.

* * * * * * *

88 EXHIBIT I.

BOSTON, *August 4th*, 1884.

To Messrs. Benjamin F. Guild, William L. Candler, Charles R. Batt, N. B. Mansfield, James M. Prendergast, committee of first-mortgage bondholders of the Iron Railroad Company.

GENTLEMEN: The contract between you and the first-mortgage bondholders gives you authority to negotiate for a participation in

the reorganization of the road by the second-mortgage or income bondholders.

As representing the latter class of bondholders, we negotiated with you before the sale for a participation. Those negotiations were pending when the sale took place. With such a plank in your contract and with such negotiations pending we considered ourselves secure.

The foreclosure was at the instance of the Central Trust Company and under both mortgages.

We are advised that the purchase by you could, under the circumstances, only be in trust for both classes of securities.

We have just been informed through the public press and with no word from you that a new corporation, called the "Iron Railway Co.," has been hastily organized by you, and that you propose to convey the property and road of the Iron Railroad Company to such new organization. The capitalization of this new company is such it is evident that our rights have not been considered, and we hasten to give notice to you and the public that we may not be in laches, and that no other innocent person may suffer.

We are further advised that any transfer of the road by you for the benefit of the first-mortgage bondholders only will subject you to individual liability, and, moreover, that you cannot give a good title.

89 We desire to notify you that we shall hold you responsible to us as bondholders of the second-mortgage bonds and to all such bondholders as we represent.

We further desire to notify you that it appears by official returns, and is a fact, that at all times since the failure to meet the interest upon your bonds—that is, the first-mortgage bonds—our road has earned more than was ample to pay the interest upon your bonds, and that it was entirely your own fault that you did not take possession and secure the payment of it.

It is a more serious question whether there has been such a default as would entitle the holders of the bonds whom we represent to take possession, as the directors had not declared a dividend on our bonds; moreover, we had no hand in the consolidation and no voice in it.

We desire further to notify you that we claim that there was fraud, collusion, and irregularity in the foreclosure and sale as affecting us, and that we shall proceed to protect ourselves against the same and to secure our full rights in the premises.

Respectfully yours,

WM. ROBINSON,
GEO. W. MORSE,
HERBERT STEWARD,
Majority of Committee of 2nd-Mtg. Bondholders Iron R. R. Co.

90 EXHIBIT J.

BOSTON, *Aug. 4th,* 1884.

To the Iron Railway Company, a corporation supposed to have been organized to purchase property and franchises of the Iron Railroad Company in Ohio or to issue stock for its first-mortgage bonds:

The undersigned are a committee representing the various holders and owners of the second-mortgage or income bonds of the Iron railroad.

This committee also as individuals are owners of a large amount of said bonds.

As such committee and as individual owners of said bonds we desire to notify you that the committee of the first-mortgage bondholders, viz., Benjamin F. Guild, William L. Candler, Charles R. Batt, N. B. Mansfield, and James M. Prendergast, who purchased the property of said Iron Railroad Company at foreclosure sale recently held in Cincinnati, can give no title to said property.

We desire to notify you further that there was fraud in the proceedings to foreclose as affecting us and the other bondholders whom we represent.

We further desire to notify you that said committee, so far as it had power to purchase at said sale, purchased in equity as trustee for both classes of securities, and that the reorganization represented by your corporation was in fraud of the understanding and agreement between our committee and the committee of said first-mortgage bondholders, which was entered into in pursuance of the powers vested in said latter committee by the first-mortgage bondholders in the articles of contract under which they acted.

We further desire to notify you that the proceedings to foreclose were not regular or in accordance with the terms of the instrument s and were contrary to law and equity; that there had been no fair default in interest, and that we shall proceed to protect our rights, and for a rescission of said sale, and to compel such reorganization as will recognize our interest.

Respectfully yours,

(Signed) WILLIAM ROBINSON,
GEO. W. MORSE,
HERBERT STEWARD,

Majority of Committee of 2nd-Mtg. Bondholders Iron R. R. Co.

91–95 EXHIBIT K.

Notice.

BOSTON, *August 4th,* 1884.

The public are hereby notified that the Iron Railway Company, a reorganization of the Iron Railroad Company, so called, organized, as it is presumed, to issue its stock for the first-mortgage bonds of the Iron railroad, a corporation operating a railroad from Ironton,

in the State of Ohio, northward, can obtain no legal title to the railroad, property, or franchise of the Iron railroad, and that proceedings will be instituted to rescind the sale made to a committee of the first-mortgage bondholders, which committee, it is presumed, has transferred the said property to said new corporation or is proceeding to do so.

Any person purchasing the stock of said newly organized corporation will do so with full notice that the corporation can have no valid title to the railroad or property until the rights of the second-mortgage bondholders are adjusted.

(Signed) WM. ROBINSON,
GEO. W. MORSE,
HERBERT STEWARD,
Majority of Committee of Income Bondholders of Iron R. R. Co.

* * * * * * *

96 And afterwards, to wit, on the 6th day of July, A. D. 1885, came the defendants herein and filed in the clerk's office of the court aforesaid the following demurrer, clothed in the words and figures following, to wit:

Demurrer. Iron Railway Co.

97 Circuit Court of the United States, Southern District of Ohio, Western Division. In Equity.

WILLIAM ROBINSON, Complainant,
vs.
THE TOLEDO, CINCINNATI & ST. LOUIS R. R. Co., THE Iron Railroad Co., The Iron Railway Co., The Central Trust Co. of New York, and John C. Coombs, Respondents. } No. 3739.

The demurrer of The Iron Railway Company, one of the defendants, to the bill of complaint of William Robinson, the above-named complainant.

This defendant, by protestation, not confessing all or any of the matters and things in complainant's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth:

1st. That the complainant hath not in or by his said bill made or stated such a case as entitled him in a court of equity to any discovery from this defendant or to any relief against it as to
98 the matters contained in said bill or any of such matters.

2nd. That said bill is altogether multifarious for the following as well as other reasons:

A. For that said complainant seeks both to have the foreclosure proceedings whereby said Iron Railroad was sold avoided and said

sale set aside, *but* also to participate in the benefits of the purchase of said property at said sale.

B. For that it appears by said bill that the same is exhibited against this defendant and several other persons bearing names as defendants thereto for distinct matters and causes, in several whereof, as it appears by said bill, this defendant is in no manner interested or concerned.

3rd. That as to so much of said bill as alleges any imperfection, informality, invalidity, or insufficiency in the proceedings by which the first mortgage of the said Iron Railroad Company was foreclosed it appears—

A. That said complainant has not been injured by said proceedings, or—

B. That he might with diligence have prevented or may remedy all such injuries, if any such there were or may be, by intervening in said proceedings, and—

99 C. That for all such injuries he has a plain, adequate, and complete remedy at law in a suit against said Central Trust Company of New York.

D. That it is admitted by said bill that *the fault* was made in the payment of the interest due to the holders of the first-mortgage bonds of said Iron Railroad Company and continued up to the time of the sale of said railroad and still continues; but said bill contains no offer to pay said bonds or the interest due thereon or to redeem said property from said mortgage.

4th. That said bill does not allege any privity with or duty or liability to the income bondholders of the Iron Railroad Company on the part of the first-mortgage bondholders thereof, nor any common interest between the holders of said classes of securities.

5th. That as to so much of said bill as rests upon any alleged agreement or undertaking on the part of Benjamin F. Guild, William L. Candler, Chas. R. Batt, N. B. Mansfield, and James M. Prendergast, committee and board of trustees of the first-mortgage bondholders of said Iron Railroad Company, it appeared—

A. That all members thereof are necessary parties thereto and none of them are made parties defendant in said bill.

B. That all said members and said complainant are citizens of the Commonwealth of Massachusetts, and that *in* this court

100 has no jurisdiction to enforce said alleged agreement.

C. That said alleged agreement in said bill contained is not sufficient in form or certainty to permit the enforcement of the same or to warrant any recover of damages on account of any breach thereof.

D. That no consideration is alleged therefor, nor is the same alleged to be in such form as imports consideration.

E. That said committee and board of trustees were not authorized to make or conclude any such agreement to or with the income bondholders of said railroad as it is alleged in said bill of complaint.

6th. That said alleged agreement and this suit admit the competency of this defendant's organization; that said agreement and al-

leged authority therefor do not appear to be competent to create any privity with or duty or liability to said complainant on the part of this defendant and its stockholders.

7th. That it does not appear that John C. Coombs, one of the defendants named in said bill, from and through whose conveyance this defendant derives title and existence, was in privity with or incurred any obligation or liability to said complainant or any of said income bondholders, or was served with any notice or had any knowledge of any undertaking in behalf of any income
101 bondholders of said Iron Railroad Company or of any violation of any such undertaking, and no fraud or knowledge of or complicity in any fraud on the part of said Coombs is sufficiently alleged in said bill.

8th. That it is alleged in said bill that no foreclosure proceedings such as is set forth in said bill can bar income bondholders from the net profits and income after the payment of the interest due to said first-mortgage bonds of said Iron Railroad Company.

9th. That for the recovery of any property formerly of said Iron Railroad Company which may not have been covered by the first mortgage thereof, but which may have been covered by said second mortgage, as alleged in said bill, it appears that the parties in interest have a plain, adequate, and complete remedy at law, if any litigation in relation thereto may be necessary, which does not appear.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

THE IRON RAILWAY COMPANY,
By its solicitor, J. C. COOMBS.

102 I hereby certify that I am solicitor and of counsel for the Iron Railway Company, one of the defendants in the above-entitled cause, and that in my opinion the foregoing demurrer of said Iron Railway Company, said defendant to said bill of complaint of William Robinson, complainant, is well founded in point of law and proper to be filed in the above-entitled cause.

JOHN C. COOMBS,
Solicitor and of Counsel for the Iron Railway Company, Defendant.

UNITED STATES OF AMERICA, }
District of Massachusetts, } *ss:*

BOSTON, *June 23d*, 1885.

I, Edward E. Lloyd, president of said the above-named defendant, The Iron Railway Company, being duly sworn, depose and say that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

EDWARD E. LLOYD.

Subscribed and sworn to before me this 23rd day of June, A. D. 1885.

JOHN G. STETSON,
[SEAL.] *U. S. Commissioner.*

103 And afterwards, to wit, on the 6th day of July, A. D. 1885, the following demurrer was filed in the clerk's office of the court aforesaid in this cause, clothed in the words and figures following, to wit:

Demurrer of Jno. C. Coombs.

104 The Circuit Court of the United States, Southern District of Ohio, Western Division. In Equity.

WILLIAM ROBINSON, Complainant,
vs.
THE TOLEDO, CINCINNATI & ST. LOUIS R. R. Co., THE Iron Railroad Co., The Iron Railway Co., The Central Trust Co., New York, and John C. Coombs, Respondents. } No. 3739.

The demurrer of John C. Coombs, one of the defendants, to the bill of complaint of William Robinson, the above-named complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth:

1st. That the complainant hath not in or by his said bill made or stated such a case as entitles him in a court of equity to any discovery from this defendant or to any relief against him as to the matters contained in said bill or any of such matters.

105 2nd. That said bill is altogether multifarious for the following as well as other reasons:

A. For that said complainant seeks both to have the foreclosure proceedings whereby said Iron railroad was sold to this defendant avoided and said sale to this defendant set aside, and also to participate in the benefits of the purchase of said property at said sale.

B. For that it appears by said bill that the same is exhibited against this defendant and several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as it appears by said bill, this defendant is in no manner interested or concerned.

3rd. That as to so much of said bill as alleges any imperfection, informality, invalidity, or insufficiency in the proceedings by which the first mortgage of the said Iron Railroad Company was foreclosed it appears—

A. That said complainant has not been injured by said proceedings, or

B. That he might with diligence have prevented or may remedy all such injuries, if any such there were or may be, by intervening in said proceedings.

106 C. That for all such injuries he has a plain, adequate, and complete remedy at law in a suit against said Central Trust Company of New York.

D. That it is admitted by said bill that *the fault* was made in the payment of the interest due to the holders of the first-mortgage bonds of said Iron railroad and continued up to the time of the sale of said road and still continues; but said bill contains no offer to pay such bonds or the interest due thereon or to redeem said property *upon* said mortgage.

4th. That said bill does not allege any privity with or duty or liability to the income bondholders of the Iron Railroad Company on the part of the first-mortgage bondholders thereof nor any common interest between the holders of said classes of securities.

5th. That as to so much of said bill as rests upon any alleged agreement or undertaking on the part of Benjamin F. Guild, William L. Candler, Charles R. Batt, N. B. Mansfield, and James M. Prendergast, committee and board of trustees of the first-mortgage bondholders of said Iron Railroad Company, it appears—

A. That all members thereof are necessary parties thereto and none of them are made parties defendant in said bill.

B. That all said members and said complainant and this
107 defendant are citizens of the Commonwealth of Mass., and that this court has no jurisdiction to enforce said alleged agreement.

C. That said alleged agreement in said bill contained is not sufficient in form or certainty to permit the enforcement of the same or to warrant the recovery of damages on account of any breach thereof.

D. That no consideration is alleged therefor, nor is the same alleged to be in such form as imports consideration.

E. That said committee and board of trustees were not authorized to make or conclude any such agreement to or with the income bondholders of said railroad as is alleged in said bill of complaint.

6th. And as to so much of said bill it does not appear that this defendant has any interest in the matters therein alleged or was in privity with or incurred any liability to said complainant or any of said income bondholders, or was served with any notice or had any knowledge of any undertaking in behalf of any income bondholders of said Iron Railroad Company or of any violation of any such undertaking, and no fraud or knowledge of or complicity in any fraud on the part of this defendant is sufficiently alleged in said bill.

7th. That it is alleged in said bill that no foreclosure proceeding such as is set forth in said bill can bar income bond-
108 holders from the net profits and income after the payment of the interest due to said first-mortgage bonds of said Iron Railroad Company.

8th. That for the recovery of any property formerly of said Iron

Railroad Company which may not have been covered by the first mortgage thereof, but which may have been covered by said second mortgage, as alleged in said bill, it appears that the parties in the interest have a plain, adequate, and complete remedy at law if any litigation in relation thereunto may be necessary, which does not appear.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

JOHN C. COOMBS, *pro se.*

109–111 I, John C. Coombs, solicitor and of counsel in my own behalf and one of the defendants in the above-entitled cause, certify that in my opinion the foregoing demurrer by me to the bill of complaint of William Robinson, complainant, is well founded in point of law and proper to be filed in the above cause.

JOHN C. COOMBS,
Solicitor and of Counsel pro se.

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, John C. Coombs, being sworn, deposes and says that the foregoing demurrer is not interposed to delay the cause or any proceeding therein.

JOHN C. COOMBS.

Subscribed and sworn to before me this 23rd day of June, A. D. 1885.

JOHN G. STETSON,
[SEAL.] *U. S. Commissioner.*

* * * * * * *

111½ And afterwards, to wit, on the 7th day of April, A. D. 1886, an entry was made upon the journal of the court aforesaid in this cause clothed in the words and figures following, to wit:

Journal W, 360.

WILLIAM ROBINSON
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD CO., THE IRON RAILWAY CO., *et al.* } # 3739, Chancery.

This cause came on for hearing on the demurrers of the Iron Railway Co. and John C. Coombs to complainant's bill, and were argued by counsel; on consideration whereof the court, being fully advised in the premises, consider- said demurrers well taken,
112 and sustains the same.

It is therefore ordered, adjudged, and decreed that com-

plainant's said bill of complaint be, and hereby is, dismissed at his costs; that respondents recover of complainant their costs herein expended, to be taxed; to which ruling and judgment of the court complainants, by his counsel, excepts.

And afterwards, to wit, on the 21*rd* day of May, A. D. 1886, the following motion for allowance was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Motion for Allowance.

Circuit Court of the United States, Southern District of Ohio, W. D.

WILLIAM ROBINSON, Complainant, *vs.* THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Company, The Iron Railroad Company, The Iron Railway Co., The Central Trust Co. of New York, and John C. Coombs, Respondents.	In Equity.	No. 3739.

113 Motion for leave to file petition for rehearing.

Now comes the complainant and moves the court for leave to file his petition for rehearing in this cause upon the demurrer to the bill herein.

GEO. W. MORSE,
KITTREDGE AND WILBY,
For Complainant.

And afterwards, to wit, on the 22d day of May, A. D. 1886, an entry was made upon the journal of the court aforesaid in this cause clothed in the words and figures following, to wit:

Journal W, 394.

WILLIAM ROBINSON *vs.* THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD CO. *et al.*	No. 3739.

This day this cause came on to be heard upon the motion of complainants for leave to file his petition for rehearing in this cause upon the demurrer to the bill herein, which was argued by counsel, and the court, being fully advised in the premises, doth grant the same, and the petition is filed.

114 & 115 And afterwards, to wit, on the 22d day of May, A. D. 1886, the following petition for rehearing was filed in the clerk's office of said court; said petition is clothed in the words and figures following, to wit:

Petition for Rehearing.

The Circuit Court of the United States, Southern District of Ohio, Western Division.

WILLIAM ROBINSON, Complainant, *against* THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Company, The Iron Railroad Company, The Iron Railway Company, The Central Trust Company of New York, and John C. Coombs, Respondents.	No. 3739.	In Equity.

Now comes the complainant above named and asks the court for a rehearing of this cause upon the demurrers of the Iron Railway Company and John C. Coombs to the bill of complaint herein upon the following grounds, to wit:

116 That when this cause came on to be heard upon said demurrers, at the February term of said court, 1886, it was the intention of George W. Morse, Esq., counsel for complainant, residing in Boston, Mass., to be present and argue said demurrers.

That said Morse as such counsel had taken upon himself the exclusive preparation of said demurrers and the presentation thereof, and that counsel in Cincinnati, expecting by agreement and understanding with counsel for respondents that said George W. Morse should be present and argue said demurrers, had not undertaken the preparation of the said cause and at the time that the said demurrers came on for hearing, at said February term, were not prepared to present the same in the manner that the large interests involved in the said cause and the many and complicated questions and issues raised by the said demurrers to said bill demanded.

That by a misunderstanding between counsel in Boston, representing respondents, and the said George W. Morse, representing complainants, when the said demurrers were called, at said February term, in the circuit court aforesaid, the counsel for respondents appeared and demanded an immediate hearing of said demur-

117 rers, and that they should be at once disposed of, the said Morse being then absent and unable to appear before this court on account of previous engagements by which he was unavoidably detained in the East.

And that the argument of said demurrers had been from time to time, by mutual agreement between counsel in Boston, laid over for the mutual convenience of such counsel, and it was the understanding by and between said counsel that the said demurrers were not to be presented until both of said counsel could be present and argue them in person in the said circuit court, but that then and there, notwithstanding the said agreement relied upon by complainant's counsel, and notwithstanding the absence of said Morse and the inability, owing to the nature of the case, of counsel residing in Cincinnati to make the necessary preparation in the premises, the said de-

murrers were called and a hearing of the same insisted upon by the said counsel for respondents, and the same were then submitted to the court.

By reason of the premises the said cause was not fully and properly presented to the court with the thoroughness that the interests invoived deserved, and that thereby the court has failed in its judgment upon said demurrers to give to the bill of com-
118 plainant the consider-tion which he respectfully submits his cause is entitled to, and that if the cause were properly and fully presented, as was intended by counsel fully informed and prepared upon all the issues and questions involved, that the judgment of the court upon said demurrers would have been in favor of complainants instead of respondents, as the same was entered of record.

Wherefore, by reason of the unavoidable surprise and accident resulting in the want of proper presentation of their said bill, as above set forth, complainant respectfully asks the court to consider and allow this his petition for a rehearing of said cause upon said demurrers, and to make such order as is proper and necessary in the premises to secure to complainant a further opportunity of presenting his case upon his said bill at such time and upon such terms as to costs or otherwise as to this honorable court may seem proper.

WILLIAM ROBINSON,
By KITTREDGE & WILBY,
GEORGE W. MORSE,
For Complainant.

And afterwards, to wit, on the 1st day of Oct., A. D. 1886, an entry was made upon the journal of the court aforesaid in this
119 cause clothed in the words and figures following, to wit:

Journal W, 474.

WILLIAM ROBINSON
vs.
THE IRON RAILWAY COMPANY *et al.* } 3739.

This cause came on to be heard upon the motion of the complainant for a rehearing upon the demurrer of the Iron Railway Company and John C. Coombs to the bill of complaint, and said complainant was represented by his solicitors, Messrs. Kittredge and Wilby and William Webster, and said Iron Railway Company and said John C. Coombs by their solicitors, Gustavus H. Wald and said John C. Coombs, and said complainant was heard in support of his said motion as well upon all matters which he had to advance upon the insufficiencies of the prior hearing as upon any alleged error in the judgment thereupon rendered.

And said defendants, said Iron Railway Company and said John C. Coombs, were heard not only in support of the sufficiency of said hearing and the correctness of the judgment thereon rendered, but

also offered in open court, for the purpose of preventing any amendment hereafter to said bill by incorporating therein an
120–123 offer to redeem said Iron railroad either from the lien of the first mortgage or from the purchaser if and whenever in the future the circumstances and parties may have become changed and said property may have increased in value, to waive all objection to said bill if said complainant would amend the same forthwith by making such an offer to redeem and accept a decree of this court limiting the time therefore, and on default in making such redemption to be forever barred and foreclosed of all right, title, and interest in said property, and said complainant declined said offer.

And thereupon, upon consideration thereof, and for other sufficient reasons, as well as said offer by said defendants, said motion for a rehearing is denied and said judgment sustaining said demurrer and dismissing said bill with costs stands confirmed.

* * * * * * *

124 *Journal X*, 1.

And afterwards, to wit, on the 4th day of January, A. D. 1887, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

No. 3739.

And now came the complainant, by Kittredge and Wilby, his counsel, and in open court gave notice of and claimed an appeal upon the order and decree of this court entered April 7, 1886, dismissing the bill of complaint herein; and the court thereupon allowed the appeal herein as prayed and fixes the bond at $500.00.

And afterwards, to wit, on the 5th day of March, A. D. 1887, the following appeal bond was filed in the clerk's office of said court, clothed — the words and figures following, to wit:

125 Circuit Court of the United States, Southern District of Ohio, Western Division.

WILLIAM ROBINSON
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS R. R. Co. *et al.*

Know all men by these presents that we, William Robinson, as principal, and Benjamin Kittredge, are held and firmly bound unto the Toledo, Cincinnati and St. Louis Railroad Company *et al.* in the sum of five hundred dollars, to be paid to the said The Toledo, Cincinnali & St. Louis Railroad Co. *et al.*, its assigns or successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 5th day of March, 1887.

Whereas the above-named William Robinson has taken out an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio.

Now, therefore, the condition of this obligation is such that if the above-named William Robinson shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

—— ——. [SEAL.]
BENJAMIN KITTREDGE. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
JOSEPH WILBY.
ROB'T C. GEORGI.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. Ohio.

[Endorsed:] United States circuit court, southern district of Ohio. No. 3739. Wm. Robinson *vs.* The T., C. & St. — R. R. Co. *et al.* Appeal bond. Filed March 5, 1887. B. R. Cowen, clerk.

126 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Benjamin Kettredge, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

BENJAMIN KITTREDGE.

Sworn to before me the 5th day of March, 1887.

ROB'T C. GEORGI,
[SEAL.] *Dept. Clerk U. S. Circuit Court, S. D. O.*

127 THE UNITED STATES OF AMERICA, *ss:*

To The Iron Railway Company, John C. Coombs, The Toledo, Cincinnati & St. Louis Railroad Company, and The Central Trust Company of New York, Greeting:

Whereas William Robinson has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Ohio, made in favor of you, the said The Iron Railway Company *et al.*, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Cincinnati, in the sixth

circuit, this 5th day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

GEO. R. SAGE,
U. S. District Judge, Southern District of Ohio, Sitting as Circuit Judge & Holding the Circuit Court in the Above-Entitled Cause, There Being no Circuit Justice or Circuit Judge in the District.

128 BOSTON, MASSACHUSETTS, *March* 14, 1887.

I hereby waive service of the within citation upon the Iron Railway Company and upon myself.

JOHN C. COOMBS,
Att'y for Iron Railway Company and pro se.

[Endorsed:] United States circuit court, southern dist. of Ohio. No. 3739. Wm. Robinson *vs.* The T. C. & St. L. R. R. Co. *et al.* Citation to appellee. Filed March 21st, 1887. B. R. Cowen, clerk.

129 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the cause entitled William Robinson against The Toledo, Cincinnati and St. Louis Railroad Company and others, being numbered 3739, as the same appears of record in this court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, Ohio, this 25th day of March, A. D. 1887.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

130 Supreme Court of the United States. October Term, 1886.

WILLIAM ROBINSON, Plaintiff,
vs.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILway Company, The Iron Railway Company, The Iron Railroad Company, The Central Trust Company, and John C. Combs, Defendants.

On appeal from the circuit court of the United States for the southern district of Ohio, W. D.

Statement of errors on which appellant intends to rely and of the parts of the record which appellant thinks necessary for the consideration of said errors, pursuant to the order promulgated March 28th, 1887, by the Supreme Court of the United States.

1st. Statement of errors:

The court below erred in sustaining the demurrers of J. C. Coombs

and the Iron Railway Company and in dismissing bill of appellant, complainant below.

2nd. Parts of the record to be printed:

1. The bill of complaint below, except the verification.
2. Of the exhibits attached to said bill, the following:
3. Exhibit A.
" except paragraphs 4th & 5th of the attesting clause and the seals and signatures to said Exhibit B, the acknowledgements and certificates, the resolutions of the stockholders authorizing the issue of the bonds mentioned in Exhibit B.

131 4. Exhibit C, except the 7th paragraph, the 8th paragraph, the 9th paragraph, and the signatures, certificates, acknowledgements, and resolutions following said 9th paragraph.

5. Exhibit D.
6. " E.
7. " F.
8. " G.
9. The notice dated Boston, August 4th, 1884, from the Boston Herald, August 5th, 1884, being part of Exhibit H.
10. Exhibit I.
11. " J.
12. " K.
13. The demurrer of John C. Coombs to the bill.
14. The demurrer of the Iron Railway Company to the bill.
15. The entry sustaining said demurrers and dismissing said bill.

JOSEPH WILBY,
Of Counsel for Complainant.

Service of above acknowledged this 13th day July, 1887, and copy received.

WILBY & WALD,
Of Counsel for Defendants.

132 [Endorsed:] No. 324. U. S. Supreme Court. 1887, October term. No. 941. William Robinson *vs.* The Toledo, Cincinnati & St. Louis R'way Co. *et als.* Statement of errors and suggestion of appellant of parts of record for printing. Office Supreme Court U. S. Filed Jul- 16, 1887. James H. McKenney, clerk. Joseph Wilby, of counsel.

133 Received copy of the within designation of parts of the record.

KITTREDGE & WILBY,
Counsel for Wm. Robinson, Appellant.

Supreme Court of the United States. October Term, 1886.

WILLIAM ROBINSON, Appellant,
v.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY *et als.*, Appellees.
No. 941. In Equity.

On appeal from the circuit court of the United States for the southern district of Ohio, western division.

134 Supreme Court of the United States. October Term, 1886.

WILLIAM ROBINSON, Appellant,
v.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY *et als.*, Appellees.
No. 941. In Equity.

Appeal from the circuit court of the United States for the southern district of Ohio, western division.

Designation by the Iron Railway Company, one of said appellees, of parts of the record in the above-entitled cause which it thinks material, additional to the parts of said record which said appellant, in his statement filed in said cause, thinks necessary for the consideration of the errors upon which he relies.

First. The motion of the appellant filed in said circuit court May 21st, 1886, for leave to file petition for rehearing.

(MEMORANDA.—Attention is called to the fact that while the appearance docket of said circuit court gives April 21st as the date of the filing of said motion the motion itself shows that it was filed May 21st.)

Second. The entry in said circuit court of May 22nd, 1886, granting the motion of said appellant for leave to file petition for rehearing.

Third. The petition for rehearing filed by said appellant in said circuit court May 22nd, 1886.

135 Fourth. The entry of Oct. 1st, 1886, in said circuit court denying said appellant's petition for rehearing and confirming the former judgment of dismissal.

THE IRON RAILWAY COMPANY,
By its solicitors, JOHN C. COOMBS,
GUSTAVUS H. WALD.

136 [Endorsed:] Supreme Court U. S. 1887, October term. No. 324. William Robinson, app't, *vs.* The Toledo, Cinn. & St. L. R. R. Co. *et al.* Designation by Iron R'y Co. (one of the appellees) of parts of record to be printed.

[Stamped:] Office Supreme Court U. S. Filed Aug. 4, 1887. James H. McKenney, clerk.

137 Received copy of the within designation of parts of the record.

KITTREDGE & WILBY,
Counsel for Wm. Robinson, Appellant.

Supreme Court of the United States. October Term, 1886.

WILLIAM ROBINSON, Appellant,
v.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY *et als.*, Appellees.
No. 941. In Equity.

On appeal from the circuit court of the United States for the southern district of Ohio, western division.

138 Supreme Court of the United States. October Term, 1886.

WILLIAM ROBINSON, Appellant,
v.
THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY *et als.*, Appellees.
No. 941. In Equity.

Appeal from the circuit court of the United States for the southern district of Ohio, western division.

Designation by John C. Coombs, one of said appellees, of parts of the record in the above-entitled cause which he thinks material, additional to the parts of said record which said appellant, in his statement filed in said cause, thinks necessary for the consideration of the errors upon which he relies.

First. The motion of the appellant filed in said circuit court May 21st, 1886, for leave to file petition for rehearing.

(MEMORANDA.—Attention is called to the fact that while the appearance docket of said circuit court gives April 21st as the date of the filing of said motion the motion itself shows that it was filed May 21st.)

Second. The entry in said circuit court of May 22nd, 1886, granting the motion of said appellant for leave to file petition for rehearing.

Third. The petition for rehearing filed by said appellant in said circuit court May 22nd, 1886.

139 Fourth. The entry of Oct. 1st, 1886, in said circuit court denying said appellant's petition for rehearing and confirming the former judgment of dismissal.

JOHN C. COOMBS,
Pro se and by his solicitor, GUSTAVUS H. WALD.

140 [Endorsed:] Supreme Court U. S. 1887, October term. No. 324. William Robinson, app't, *vs.* The Toledo, Cinn. & St. L. R. R. Co. *et al.* Designation by John C. Coombs (one of the appellees) of parts of record to be printed.

[Stamped:] Office Supreme Court U. S. Filed Aug. 4, 1887. James H. McKenney, clerk.

Endorsed on cover: S. Ohio C. C. U. S. No. 324. William Robinson, appellant, *vs.* The Iron Railway Company, John C. Coombs, The Toledo, Cincinnati & St. Louis Railroad Company, and The Central Trust Company of New York. Filed May 13, 1887,

PLAINTIFF'S BRIEF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 324.

WILLIAM ROBINSON, APPELLANT,

vs.

THE IRON RAILWAY COMPANY *et al.*

GEORGE W. MORSE,
KITTREDGE & WILBY,

OF COUNSEL FOR PLAINTIFF,
Appellant.

SUPREME COURT OF THE UNITED STATES.

WILLIAM ROBINSON,

vs.

THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY, THE IRON RAILROAD COMPANY, THE IRON RAILWAY COMPANY, THE CENTRAL TRUST COMPANY OF NEW YORK, and JOHN C. COOMBS. } No. 324.

BRIEF OF WILLIAM ROBINSON,

IN REPLY TO THE DEMURRERS OF THE IRON RAILWAY COMPANY AND JOHN C. COOMBS.

FILED.
MAY 2 1890
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 324.

WILLIAM ROBINSON *v.* THE IRON RAILWAY ET AL.

SUPPLEMENT TO BRIEF.

REFERENCES TO RECORD.

BILL, PP. 1–9. — EXHIBITS, PP. 9–32. — DEMURRERS, PP. 32–37. -- SUSTAINED, AND BILL DISMISSED, PP 37–38. — APPEAL OF PLAINTIFF, P. 41.

First mortgage in bill, pages 1, 2. Exhibit C, pages 17–24. Bonds, pages 19, 20 ($500,000 principal, not due).

Second Mortgage, to same trustee, in bill, page 1. Exhibit B, pages 10–17. (Income) Bonds, Exhibit A, pages 9, 10, 12, 13, ($500,000).

Consolidation of Railroads, in bill, page 2.

Earnings of Iron Railroad, pages 2, 3, 4, 7.

Foreclosure proceedings and sale and confirmation, pages 4, 5.

Second mortgage bondholders not represented, pages 4, 5, 6.

First mortgage not in equity to be regarded as in default, pages 2, 3, 4, 7, 8.

Misrepresentation and concealment by first mortgage bondholders, etc., to second mortgage bondholders, to prevent interference of latter, pages 4, 5, 6, 7.

Purchase for first mortgage bondholders claimed to be for themselves exclusively, pages 5, 6, 7.

Though some property covered by second and not by first mortgage, page 7.

Steps to avoid laches, pages 6, 7. Exhibits, pages 28–32.

Prayers for relief, pages 8, 9.

Demurrers of Iron Railway Co., pages 32–34; of Coombs, pages 35–37.

Want of privity of Iron Railway Co., pages 33, 34.
Defective in parties, pages 33, 36.
In wrong court, pages 33, 36.
Wrong suit, pages 33, 37.
Multifarious, pages 32, 35, 36.
No offer to redeem, pages 33, 36.
Want of equity, pages 32, 35.
Adequate remedy in law, pages 33, 34, 36, 37.
Laches, pages 33, 36.
No specific lien, pages 34, 36.
No injury, pages 33, 35.
No right to relief against these defendants, pages 33, 34.
Parties citizens of same State, pages 33, 36.

XIX B.

An offer to redeem is not necessary, for the first mortgage bonds were not to be due for fifteen years, page 19.

If the interest had not been fully paid, it was not because the earnings of the road had not been sufficient; they were sufficient. (*Supra.*)

If they had been diverted from their proper use, to which they should have been applied, the first mortgagees, who had lain idly by and acquiesced, should not on that account acquire the right to freeze out the second mortgagees.

Before a reasonable foreclosure period could elapse, the income from the road collected by the receiver would satisfy all arrears on the first mortgage bonds.

MORSE & LANE,
Of Counsel for Plaintiff.

I.

BRIEF SUMMARY OF COMPLAINT.

This bill is brought in behalf of the second mortgage bondholders of The Iron Railroad. It prays that the decree foreclosing the first mortgage may be set aside, or purchasers charged as trustees for all the bondholders.

It alleges that the second mortgage bondholders were not represented in the foreclosure suit, as their trustee was acting wholly for the first mortgage bondholders, and that the decree and sale were fraudulent.

It alleges that the complainants were income bondholders; that, as such, they were entitled to a specific income; that this income was in possession of the divisional roads, and ought to have been applied upon the first mortgage bonds.

It alleges that there was no real default upon the first mortgage bonds.

It alleges that, after the fraudulent decree had been rendered, the committee of the first mortgage bondholders by misrepresentations prevented the second mortgage bondholders from bidding at the sale; and it prays generally and specially for relief.

II.

POINTS IN DEMURRERS.

(A) There are twenty-one points in the demurrers.

(B) Twenty of the points in one are identical with twenty in the other.

(C) One point, found only in the demurrer of The Iron Railway, relates to the competency of certain of its acts.

(D) Many of these points are objections to the form of our proceedings, but several are to the merits of the cause.

(E) The objections to the form are, that the bill is defective in parties, brought in the wrong Court, is the wrong kind of a suit, is multifarious, and contains no offer to redeem.

(F) The objections upon the merits are, want of equity, adequate remedy at law, laches, no specific lien, and no injury.

(G) These defendants say we have no title to relief against them, and that the committee of the first mortgage bondholders were necessary parties. They say that because we have joined Coombs as a defendant, and Coombs resides in the same State as Robinson, the plaintiff, we have defeated the jurisdiction of the Court.

III.

THE BILL MAKES PROPER PARTIES.

(A) Coombs and The Iron Railway Company allege that they are not proper parties.

(B) We reply that Coombs purchased the road under the decree, and conveyed it to The Iron Railway.

(C) They are both necessary parties: Coombs, because "The purchaser under the sale sought to be set aside should be made a party to the bill" (2 Jones on Mort., § 1668); The Iron Railway, because "Third persons who have bought of the first purchaser should, in like manner, have an opportunity to be heard" (2 Jones on Mort., § 1668).

(D) Purchasers and transferees were made parties defendant in *Pac. R. R. of Mo.* vs. *Pac. Ry.* et al., 111 U. S. 505, *Sahlgard* vs. *Kennedy* et al., 1 McCrary, 291 (suits to rescind decrees); in *Brinkenhoff* vs. *Brown*, 6 Johnson's Ch., *Howell's Heirs* vs. *McCreery's Heirs* et al., 7 Dana (Ky.), 388 (suits to rescind judicial sales); in *Minn. Co.* vs. *St. Paul Co.*, 2 Wall. 609 (a suit to construe decree).

(E) In *Crawford* vs. *Tuller*, 35 Mich. 57; and *Lawrence* vs. *Jarvis*, 36 Mich. 281, proceedings were dismissed because purchasers and transferees were not made parties.

(F) In *Pac. R. R. Co. of Mo.* vs. *Mo. Pac. Ry.* et al., the purchase was made through an attorney, who transferred it to a new organization, as in this case. The attorney as the purchaser and the new organization as his transferee, were made defendants.

(G) The committee of first mortgage bondholders were not joined in the case at bar, because no relief is prayed against them. Acting as a committee, they were agents to secure the decree and reorganization. They are not parties to the record in the previous suit, and are not necessary parties in this suit. Their acts are mentioned as bearing upon the main charge of fraud in the decree.

IV.

THE UNITED STATES COURT HAS JURISDICTION.

(A) This Court has jurisdiction, notwithstanding Coombs and Robinson are citizens of same State, because the suit is ancillary to the previous suit.

(B) This is established by repeated decisions. It is not now open to question. *Pac. R. R. of Mo.* vs. *Mo. Ry. Co.* et al., 111 U. S. 505, *Minn. Co.* vs. *St. Paul Co.*, 2 Wall. 609, 634, *Krippendorf* vs. *Hyde*, 110 U. S. 276, were all original bills in chancery

sense, but ancillary in view of United States Courts, and having parties as plaintiffs and defendants residing in same State.

(C) In *Peay* vs. *Schenck* et al., 1 Woolworth, 175, 184, a cross bill made a new party who could not have been joined in the original suit.

See opinions of

Matthews, J., in *Krippendorf* vs. *Hyde*, 110 U. S. 286.
Miller, J., in *Minn. Co.* vs. *St. Paul Co.*, 2 Wall. 634.
Blatchford, J., in *Pac. R. R. Co. of Mo.* vs. *Mo. Pac. Ry. Co.*, 111 U. S. 522.

And in *Foster* vs. *Mansfield C. & L. M. R. Co.*, 36 Fed. Rep. 627, N. D. Ohio, E. D., jurisdiction of a bill to set aside its foreclosure decree for fraud was sustained, although some of the defendants were citizens of the same State as the plaintiff, because the suit was ancillary.

V.

THE BILL IS NOT MULTIFARIOUS.

(A) Defendants say it joins distinct causes and prays alternative and inconsistent relief, therefore it is multifarious.

(B) We reply that it raises but one question, and all the parties are necessary to its solution, therefore it is not multifarious.

(C) All the allegations and prayers are incidental to the main question, Shall the fraudulent decree in the sale be set aside?

It has been repeatedly adjudged that bills are not multifarious because the parties essential to the main question are interested in different relations.

Bank of Muskingum vs. *Carpenter's adm'r*, Wright (Ohio), 729.
Pac. R. R. of Mo. vs. *At. & Pac. R. R. Co.*, 20 Fed. Rep. 277.

(D) The bill narrates a series of acts all leading to and culminating in the decree and sale. Different parties performed different parts, but they were all inseparably connected together, and many of the defendants were practically identical.

(E) The first mortgage bondholders, the committee of the first mortgage bondholders, the attorney of the first mortgage bondholders, the trustees of the first mortgage bondholders, and the reorganization of the first mortgage bondholders, are all the same.

(F) The bill does not pray for multifarious relief, and is therefore not multifarious.

Wells vs. *Partridge*, 31 N. J. Eq. 382.
Van Horn vs. *Pine*, 31 N. J. Eq. 367.

And none but parties injured by the prayers can take exceptions to them.

Buerk vs. *Inhauser*, 8 Fed. Rep. 457.

(G) Though we ask alternative relief, yet it is not inconsistent. A prayer for alternative relief does not make a multifarious bill.

Elliott vs. *Lamon* et al., 1 McArthur (D. C.)

The prayer for relief is against the same parties, for the same cause, and addressed to the discretion of the Court, and is therefore not multifarious.

To pray for two kinds of relief in the same bill would not make it multifarious, as was held in *Pac. R. R. of Mo.* vs. *At. & Pac. R. R. Co.*, 20 Fed. Rep. 277.

(H) As to the alleged scandal and impertinence, if there is any, it has no effect on the bill.

1 Dan. Ch. Pl. and Pr., § 349.

VI.

COMPLAINANT'S ONLY REMEDY IS NOT AN INTERVENING PETITION.

(A) We were not apprised by our trustee in season to intervene before final decree. We then intervened, and the Court dismissed our bill, holding our proper remedy was by an original bill.

(B) We have a right to proceed to have a fraudulent decree set aside by a bill in equity, even though we might have a remedy by a motion in the original suit.

2 Jones on Mort., 3d. ed., § 1668.

VII.

AN ORIGINAL BILL IS COMPLAINANT'S BEST REMEDY.

(A) An original bill is the proper remedy to set aside a fraudulent decree.

Story's Eq. Pl., § 426.
Dan. Ch. Pl. and Pr., § 306.
Adams' Eq., § 419.
Mitford's Ch. Pl., § 94.

An original bill was held a proper proceeding to set aside a fraudulent decree of foreclosure, procured during the confinement of the mortgagor in an insane asylum, by the mortgagee deceiving the mortgagor's attorneys, in *Lockwood* vs. *Mitchell*, 19 Ohio, 448.

(B) Such a bill is an original bill in the nature of a bill of review. It is a proper remedy in case of fraud, error, and newly discovered evidence. The bondholders' original bill to set aside decree, consented to by their trustee, in *Campbell* vs. *R. R. Co.*, 1 Woods, 368, 374, 2 Woods, 263, was said by Justice Bradley to be an original bill in the nature of a bill of review, and a proper remedy.

(C) Decrees were set aside for fraud and error, which appeared by the records in *Gaytes* vs. *Franklin Savings Bank*, 85 Ill. 256; *Enswinger* vs. *Powers*, 108 U. S. In one of these cases it was defect of parties; and in one, unfairness of the Court.

For cases of fraudulent decrees set aside upon original bills, see below.

(D) *Pac. R. R. of Mo.* vs. *Mo. Pac. Ry.* et al., 111 U. S. 505, is a leading case where a fraudulent decree was set aside upon an original bill after an intervening petition had failed.

(E) *Campbell* vs. *R. R. Co.*, 1 Woods, 368, *Sahlgard* vs. *Kennedy* et al., 1 McCrary, 291, were bondholders' bills to set aside decrees of foreclosure, and it was held that the supineness of the trustees in not taking active measures to protect his beneficiaries was fraud, and was ground to reverse the decree.

(F) Many examples of original bills to set aside fraudulent judicial sales are found under a subsequent head.

For a few examples of fraudulent decrees set aside or enjoined upon original bills brought therefor, see below.

(G) The following are examples where the decrees and judgments themselves were set aside as fraudulent or enjoined, or bills therefor were sustained on demurrer, with the reasons of the same, namely: —

Because trustee, acting as agent of syndicate of bondholders, allowed them to control suit, and consented to injurious decree to sell road, the purchase money to be paid in bonds and road transferred to reorganization for inadequate price.

Sahlgard vs. *Kennedy*, 1 McCrary, 291.

Because decree was injurious and trustees ought to have resisted it, but consented to it.

Campbell vs. *R. R. Co.*, 1 Woods, 368.

Because decree was really a compromise, and made by an unfaithful attorney giving away his client's rights.

Holker vs. *Parker*, 7 Cranch, 436.

Because judgment was obtained by misrepresentation of plaintiff's attorney, whereby defendant did not appear and was defaulted.

Pearce vs. *Olney*, 20 Conn. 545.

Because of collusion of officers of company with attorney of purchaser.

Pac. R. R. of Mo. vs. *Mo. Pac. Ry.* et al., 111 U. S. 505.

Because of collusion between officers of company and purchasers to increase the mortgage debt, etc.

Drury vs. *Cross*, 7 Wall.

Because debtor fraudulently confessed judgments to conceal his property from creditors.

Brinkerhoff vs. *Brown*, 8 Johns. Ch. 139.

Because attorney, acting in collusion with opposite party, consented to compromise decree in fraud of his client.

De Louis vs. *Meek*, 2 Greene (Iowa), 55.

Because decree distributing a fund was made in absence of one of the interested parties.

Williams vs. *Gibbes*, 17 How. 239.

Because the proper parties were not before the Court, and were misrepresented.

Alexander vs. *Slavens*, 7 B. Mon. (Ky.), 351.

Because party had not notice of decree of distribution it was changed as to him.

David vs. *Frowd*, 1 Milne & Keen, 200.
Gillespie vs. *Alexander*, 3 Russ. 130.

Because party interested in procuring decree kept back material information from the Court, and the Court said the withholding of the knowledge amounted in the eye of the law to fraud. This was a decree establishing a compromise, and affecting the rights of an infant.

Brooke vs. *Lord Mostyn*, 2 De G. J. & Smith, 373.

Because of ignorance (without laches) of defendant, and combination to deprive him of his rights.

Davis vs. *Tileston*, 6 How. 114.

Because of newly discovered evidence of fraud on part of defendant.

Ocean Ins. Co. vs. *Fields*, 2 Story, 59.

VIII.

COMPLAINANT IS NOT GUILTY OF LACHES.

(A) He was not guilty of laches in not seasonably intervening in the prior suit.

(B) It is expressly held that the failure of any number of beneficiaries to do that which their trustees ought to have done for them, cannot be imputed to them as laches.

(C) A similar defence was set up in vain in *Pac. R. R. Co. of Mo.* vs. *Mo. Pac. Ry.* et al., 111 U. S. 505. (See opinion of Blatchford, J., cited.)

(D) Complainant in the suit at bar is no more guilty of laches than were complainants in *Campbell* vs. *R. R. Co.*, 1 Woods, 368, and *Sahlgard* vs. *Kennedy* et al., 1 McCrary, 291.

IX.

COMPLAINANT WAS NOT PROPERLY REPRESENTED IN THE FORECLOSURE SUIT.

(A) The Central Trust Company could not act in behalf of one set of beneficiaries as defendant in a case in which it was acting as plaintiff in behalf of another and hostile class of beneficiaries.

The rule is that beneficiaries as well as trustees are necessary parties to suits concerning trust property.

Story's Eq. Pl., § 207.
Dan. Ch. Pl. and Pr., § 592.

In *Simmons' Successor* vs. *Taylor's Successor*, 23 Fed. Rep. 849, The Farmers' Loan and Trust Company was trustee for two classes of bondholders, namely, of the first mortgage, and the subsequent equipment and income mortgage. As it failed properly to represent the latter mortgage, the bondholders filed a petition, and obtained the appointment of Simmons as a new trustee, who took the necessary action to preserve their rights, by filing a cross bill to be allowed to redeem from the sale under the first mortgage.

[NOTE. — The exception to the rule allowing trustees to represent numerous beneficiaries only exists in cases where they can well represent them and have no adverse interests.

Board of Supervisors vs. *Mineral Point R. R. Co.*, 24 Wis. 93, and *Shaw* vs. *Norfolk Co. R. R. Co.*, 5 Gray, 162, were put upon this precise ground, the Court in the latter case saying, "The sole object of the bill is to secure and protect their rights and interests. The trustees have no adverse claims," etc.]

In *The Farmers' Loan and Trust Co.* vs. *Green Bay & Minn. R.R. Co.*, 10 Biss. 203, where two mortgages held by the same trustee were foreclosed in the same suit, the suit was brought at the express request of both classes, more than one-half of each class joining in the request.

The cases where an individual holding two mortgages has been compelled to unite them in foreclosure suit has no effect, as it is an entirely different case, the same person being both the prior and subsequent incumbrancer and having no inconsistent obligation.

On the other hand, where the trustees do have adverse interests they cannot represent their *cestuys que trustent*.

Webb et al. vs. *Vt. Central R. R. Co.* et al., 20 Blatch. 218.

Mercantile Trust Co. vs. *Lamoille Val. R. R. Co.*, 16 Blatch. 324.

Dwight vs. *Smith* et al., 13 Fed. Rep. 50.

In fact, this principle is admitted in all the cases of bondholders' suits, for they all proceed upon the theory of a failure on the part of the trustees to properly represent their beneficiaries.

In replying to the objections that trustees could properly represent their beneficiaries, Wheeler, J., said, in *Webb* vs. *Vt. Central R. R. Co.*, 20 Blatch. 218: "But the bill does show that the trustees have acquired adverse interests, and stand in a hostile position, so that they cannot maintain the orators' rights without attacking their own. They could not be orators against themselves; this is a sufficient reason for making them defendants. Where the orators' interests were in suit, and with them as defendants, there would be no one to prosecute the orators' claims but the orators themselves."

In *Mercantile Trust Co.* vs. *Lamoille Valley R.R. Co.*, 16 Blatch. 337, Justice Wheeler gives, as a reason why a trustee could not properly represent two classes of bondholders in a suit then pending in another Court, that "The only decree there, would be either that he should be foreclosed unless he should pay himself and the other so much by such a time, or that both should be foreclosed unless they should pay him so much by such a time. In either case he could redeem by paying himself, which would not accomplish anything."

The above, however, is not the principal reason why we object to the decree on account of lack of proper representation. It is because of actual unfaithfulness on the part of The Central Trust Company, as is more fully shown elsewhere.

Campbell vs. *R. R. Co.*, 1 Woods.

Sahlgard vs. *Kennedy*, 1 McCrary 291.

The prior incumbrancer's interest is adverse to that of the second incumbrancer.

Union Bk. vs. *Bell*, 14 Ohio, St. 200.

The proper place of subsequent incumbrancers is with the defendant, and not with the plaintiff.

2 Jones on Mort., § 397.

"Where complainants are allowed to dispense with parties on account of their numerousness . . . . . they ought to proceed with the utmost fairness and good faith, and not resort to anything like sharp practice in procuring a final decree which is to be binding upon all."

Justice Bradley, in *Campbell* vs. *R. R. Co.*, 1 Woods 379.

And he held that such a course was ground to set the decree aside.

The case at bar is stronger than that case, because The Central Trust Company appeared upon the record as plaintiff, and no party appeared upon the record as representing the second mortgage bondholders, whose interests were entirely unprotected.

X.

COMPLAINANT'S TRUSTEE WAS GUILTY OF FRAUD.

As will appear under a later head, the trustees have positive duties.

The Central Trust Company, by its failure to take active measures for the protection of its beneficiaries, was guilty of fraud in the eye of the law. For their supineness in consenting to an injurious decree, Justice Bradley set the decree aside in *Campbell* vs. *R. R. Co.*, 1 Woods, 368, placing his decision upon this precise ground.

The Central Trust Company, however, is guilty not only of supineness, but it was an active party and procured the fraudulent and injurious decree in this suit. It supineness was shown in its failure to compel The Iron Railroad to keep accurate accounts of the net earnings, and see that they were properly applied upon the income bonds.

It is held that it is the duty of the trustees for income bondholders to do this.

Wallace, J., in *Barry* vs. *Mo., Kans. & Tex. Ry. Co.*, Fed. Rep., May 4, 1886.

He commented severely both upon the railroad companies and the trustees in that case.

It also was culpable for failing to take possession under the provisions of the two respective mortgages which it held, while knowing that this neglect was costing the income bondholders their interest money.

Caffrey vs. *Darby*, 6 Vesey, 488.
Harrison vs. *Mock*, 10 Ala. 185.
Freeman vs. *Cook*, 6 Ired. (N. C.), Eq. 373. (See subsequent head.)

A faithful trustee would not lay by without taking active measures to protect them.

Brice vs. *Stokes*, 11 Ves. 319.
Lord Shipbrook vs. *Lord Hinchinbrook*, 16 Ves. 477.
Walker vs. *Symonds*, 3 Swans. 1.

A party procuring a decree commits a fraud by concealing facts from the Court as well as by representing those which are not true, and Lord Justice Turner, in *Brooke* vs. *Lord Mostyn*, 2 D. G. J. & S. 373, 419, set the decree aside for this reason.

The procuring of a decree of foreclosure of the Iron Railroad under the following circumstances was a positive fraudulent act on the part of all concerned. This decree, rendered April 1, 1884, directs that the road shall be foreclosed within ten days unless $45,000 is paid, the amount of three overdue semi-annual interest payments.

The reports of the master show that for the portion of the time only during which separate accounts had been kept by the receiver, —to wit: from November 1, 1883, to April 1, 1884,—the net earnings were $33,716. It is probable, therefore, that the whole net earnings at this time would have paid the entire default. The road was rapidly earning additional net income. A few weeks or months would have paid the whole beyond doubt.

Ninety days or six months is the least time which can reasonably be given to subsequent incumbrancers to redeem from foreclosure. (Per Justices Matthews and Miller, in *Chi. Vinc. R. R. Co.* vs. *Fosdick*, 106 U. S. 47; *Howell* vs. *Western R. R. Co.*, 94 U. S. 466.

These earnings ought to have been taken into account, and have been applied before the road was foreclosed. A faithful trustee in behalf of the second incumbrancers under these circumstances could not have asked the Court to foreclose without doing it; but The Central Trust Company did worse than this, because it alleged that no interest was due upon the second mortgage bonds. This was untrue, as large amounts of interest were equitably due, though undeclared.

The failure of The Central Trust Company to take active measures to prevent such an injurious decree makes it personally liable under the decisions.

Conduct so culpable as to make the trustee personally responsible is ground to set the decree aside.

XI.

THE IRON RAILROAD COMPANY WAS GUILTY OF FRAUD.

The case of The Iron Railroad Company is very similar to that of The Central Trust Company, but with this difference, that The Iron Railroad Company actually received the net earnings and diverted them. It consented to the consolidation, and it consented to the decree by allowing the bill to be taken *pro confesso;* and the consolidated companies were also guilty of the same fraud in failing to preserve the trust fund. They were doubly trustees. A mortgagor while in possession is a trustee; but, besides that, corporations, unlike individuals, are trustees of their assets for the benefit of their creditors.

The net earnings of The Iron Railroad passed into the hands of the consolidated companies, charged with a double trust. *First.* Under the one which the law implies just mentioned. (*Hibernia Ins. Co.*, 13 Fed. Rep. 516. *Brum* vs. *Merchants Ins. Co.*, 16 Fed. Rep. 140. *Plair* vs. *St. Louis*, 22 Fed. Rep. 36.) *Second.* Under the express trust contained in the income bonds attaching to specific earnings and following them into the hands of transferees. (See subsequent heads upon income bonds.)

XII.

THE DECREE WAS FRAUDULENT.

Under this head we distinguish the decree from the sale, but we claim that they were both fraudulent. The fraud in the decree has been particularly pointed out in the prior topics.

We have shown that all the parties concerned in the bill and decree in the former suit were guilty of fraudulent commissions and omissions; that the decree failed to take account of the receiver's net earnings or the prior diverted earnings; that it foreclosed the mortgage in an unreasonably short space of time under especially unjust circumstances; that the only party claimed to have represented the second mortgage bondholders was acting wholly in the interest of the parties seeking the foreclosure.

We have pointed out especially the failure of The Central Trust Company to take possession and prevent the diversion; to insist on the keeping of proper accounts and application of the earnings upon the income bonds; the false allegation that no interest was earned, the rapid earning of the same, and the large amount of accrued earnings unapplied at the time of the foreclosure.

Justice Matthews said that foreclosing the road for a greater default than really existed was a vital error.

Chi. Vinc. R. R. Co. vs. *Fosdick*, 106 U. S.

One effect of this, as he has said, is, that it prevents the sale of the road for an adequate price. Thus the fraud in the decree in this case paved the way for the subsequent fraud in the sale.

In addition to this, we say that the net earnings collected by the receiver were moneys held by the terms of the bonds for a specific purpose. That the receiver, as the officer of the Court, held this money as though it had been paid into Court in trust, to be applied as specified in the provisions of the second mortgage or income bonds,— namely, first to cancel with them the interest on the first mortgage, and pay the balance over to the complainants.

At the date of the decree of foreclosure, March 31, 1884, about eight months' net earnings were admitted to be in the receiver's hands. The default declared took no notice of this, and finds about $47,000 (or three semi-annual interest payments, and interest upon them) due.

The earnings in five months, from November 1, 1883, to April 1, 1884, were $33,716. During the other three months prior to November 1, 1883, the earnings are alleged to have been in substantially the same proportion, making a sufficient amount then paid into Court to cancel the entire default.

The decree, however, is erroneous in any event, as it finds a default certainly greater than there really was. We are therefore not necessarily compelled to offer to redeem. This bill also seeks for an account of all the diverted earnings.

XIII.

THE SALE WAS FRAUDULENT.

(A) Under this head we distinguish the sale from the decree, though both were fraudulent.

The records in the case show that the property sold for a grossly inadequate price. Property, which in five months in the receiver's hands nets more than enough to pay the entire interest for a year upon the first mortgage bonds, is sacrificed, if it is given to them to be paid for in their bonds only.

(B) In this case there were special acts of fraud. After the decree had been made the committee of the first mortgage bondholders represented to the second mortgage bondholders that they would purchase the property and hold it in the interest of both classes.

It was well known that the value of the property would not equal the amount of both classes of bonds. Virtually the first

and second mortgage bondholders were the only parties interested in this property. By the representations of the first mortgage bondholders, the second mortgage bondholders were prevented from taking measures to protect themselves.

The first mortgage bondholders now claim that the promises of their committee are not legally binding upon them, and that if they were, not having been put into proper form, they are barred by the Ohio statute of frauds; that, although an inequitable defence might avail them if this were a proceeding at law, but, as was said by Justice White, in *Matthews* vs. *Leaman*, 24 Ohio State, 615, 623, "Fraud in equity is an exception to every rule; and . . . . .the statute of frauds was not made to cover fraud."

Chief Justice Johnson, in *Watson* vs. *Erb*, 43 Ohio State, 49, upon this same point has said, in alluding to the Ohio statute of frauds, that where parties have been deceived to their injury, they have a remedy in equity, notwithstanding the agreement be within the statute of frauds and not enforcible at law, saying, "Equity will relieve against a fraudulent purchaser by converting him into a trustee for the person injured." He also said, "The action is brought, not on the verbal agreement, but because of the bad faith, fraud, and injury in refusing to perform it."

This also is an answer to the charge that the representation of the committee did not constitute a legally perfected contract.

There are a series of decisions setting aside judicial sales for reasons similar to those in the case at bar, which we are about to cite, namely: inadequacy of price; unfairness; undue haste; privacy; misrepresentation; improper day; improper mode; improper place of sale; disregard of wishes of defendant; inconsistent position of purchaser and seller; misunderstanding of owner of reversion; deception practiced by purchaser upon second mortgagee; disregard of arrangement among interested parties about bidding; fraud in stating the amount due, etc.

The following instances are given of sales set aside:—

Stinson vs. *Pepper*, 10 Biss. 107, for inadequacy of price, and because the mortgagee represented to the mortgagor that he would hold the property merely as security, and failed to keep his promise.

Seaman vs. *Riggins*, 2 N. J. Eq. 214, for privacy of sale, etc., and because the second mortgagee was prevented from bidding by misrepresentations of complainant's solicitor, etc.

Cummings vs. *Little*, 16 N. J. Eq. 48, for inadequate price, and because the purchaser urged a hasty sale to prevent the defendant in execution from bidding (in fraud of a previous arrangement among interested parties).

In *Forman* vs. *Hunt*, 3 Dana (Ky.), 614, for misrepresentation of the seller that there would be a right to redeem, thereby war-

rantor being deterred from bidding, the property being indirectly purchased by an attorney through a third person.

In *Howell's Heirs* vs. *McCreery's Heirs*, 7 Dana (Ky.), 388, for inadequate price and privacy of sale the purchase by plaintiff's attorney was held fraudulent.

In *Campbell* vs. *Gardner*, 11 N. J. Eq. 423, for inadequacy of price and misunderstanding of assignor and mortgagor (an aged and infirm woman), who did not understand the notice that her property would be sold.

Busey vs. *Harding*, 2 B. Mon. (Ky.), 407, for inadequacy of price, privacy of sale, etc.

In *King* vs. *Platt*, 37 N. Y. 155, for inadequacy of price, and because made on election day and conducted in disregard of the wishes of defendant as to the method of selling.

In *Woodward* vs. *Bullock*, 27 N. J. Eq., for misrepresentation as to the amount of legacies charged on the estate.

In *Lefevre* vs. *Laraway*, 22 Barb. (S. C.), 167, and in *Michoud* vs. *Girod* et. al., 4 How. 503, and in *Miles* vs. *Wheeler* et al., 43 Ill. 123, for the fiduciary characters as guardian *ad litem*, executor or administrator of sellers and purchasers.

In *Graffam* vs. *Burgess*, 117 U. S., after the sale, for unfairness and great inadequacy.

In *James* vs. *R. R. Co.*, 6 Wall. 752, for deception as to amount of mortgage debt — a sale by mortgagee to himself as trustee for bondholders about to reorganize.

In *Boswell* vs. *Cooks*, 51 Law Times, 243 (Sup. Ct. of Ind., Ct. of App., August 6, 1884), because purchaser obtained property for less than its value by deceiving the Court in keeping information of facts known to him, enhancing the value of the property (a favorable medical opinion of the duration of the life of a *cestui que vie*, and consequent duration of a life estate).

XIV.

COMPLAINANT HAS NO ADEQUATE REMEDY AT LAW.

(A) In *Dwight* vs. *Smith*, 13 Fed. Rep. 50, and *Richardson* et al. vs. *R. R. Co.*, 44 Vt. 613, similar objection of want of equity was made, but the Court held that it was not sufficient.

(B) *Dwight* vs. *Smith* was a bondholder's suit against the trustee and his fraudulent vendees. The Court, in disposing of the objection, said that the avails of the property could not be reached in a suit at law for the benefit of all the bondholders.

(C) The above follows from the fact that a suit at law by a single bondholder could only reach the amount due upon his particular bond.

(D) Equity which allows one bondholder to sue in behalf of all saves a multiplicity of suits.

(E) Besides this, the amount due upon a particular bond could not be ascertained by the taking of accounts which could only be done in equity.

XV.

DEFINITION OF INCOME BOND.

[NOTE. This head and the following five other heads embrace the whole subject of the rights of a railroad income bondholder. It is impossible to do justice to the subject by any abridgement.

The authorities fully sustain the view that the bondholder has an equitable title to specific earnings, which is not defeated by consolidation or diversion. He has a present absolute vested right, quite different from the conditional one of even an ordinary income mortgagee.

The income bondholder's lien, though analogous, has one point of radical superiority to the mortgagee's lien. It always attaches before possession taken. A series of cases conclusively establish this difference.

The decisions on the cases of income bonds proceed on the theory of a totally different contract from that of a mortgagee, for, otherwise, many cases which we are about to cite in regard to income bonds under a subsequent head, would be in conflict with the decisions which we shall cite under the income mortgagee's lien.]

(A) An income bond is one whose interest is payable in income or net earnings.

(B) It is an equitable assignment of net earnings. This is because a specific fund is appropriated for payment.

It is an equitable assignment, because the property transferred was not in existence at the time of the transfer.

(C) There can be no doubt that a bond whose interest is expressly payable only in net earnings, and payable as of a certain year and non-cumulative, is an equitable assignment.

(D) An income bond (payable only in income) is a transfer of the earnings, not as security, but as absolute payment. It thus differs from mortgages, even ordinary income mortgages.

XVI.

RAILROAD INCOME BONDHOLDER'S LIEN.

(A) An income bondholder has a specific lien upon the net earnings of the company, amounting to an equitable assignment of them.

Barry vs. *Missouri, Kan. & Tex. Ry. Co.*, Fed. Rep. of May 4, 1886, p. 1. (Circ. Ct., S. D. New York.)

Kitten vs. *Union Pac. R. R. Co.*, 17 Fed. Rep. 480.

Ketchum vs. *St. Louis*, 101 U. S. 306.

Morgan vs. *Union Pac. Ry. Co.*, 11 Fed. Rep. 692.

Tompkins vs. *Little Rock & Ft. Smith Ry. Co.*, 15 Fed. Rep. 6.

Union Pac. R. R. Co. vs. *United States*, 99 U. S. 402.

Ketchum vs. *Pac. R. R.*, 4 Dill. 78, 86.

(B) "Such income is in that case specifically pledged, and becomes theirs as soon as it is earned.

Jones on R. R. Securities, § 114.

[NOTE.—*Pullan Tr.* vs. *C. & C. Air Line R. R. Co.* et al., 5 Biss. 237, might be cited, but the lien seemed to be derived from the mortgage in this case, and perhaps the bonds were not income bonds.]

This point is proven by analogous cases of preference shares of stock payable in specific net earnings.

Nickals et al. vs. *New York L. E. & W. R. Co.* et al., 15 Fed. Rep. 575.

Boardman vs. *Lake Sh. & Mich. So. Ry. Co.*, 84 N. Y. 157.

Thompson et al. vs. *Erie Ry. Co.*, 45 N. Y. 468.

Dent vs. *London Tramway Co.*, 16 L. R. Ch. Div. 344.

(C) The lien of preference shares, unlike that of income bonds, is void against creditors.

The equitable ownership of the net earnings by the income bondholder as fast as they accrue was strongly set forth by Justice Wheeler in *Ritten* vs. *Union Pac. R. R. Co.*, 17 Fed. Rep. 480, which was a case where the income bondholders of the Denver

Pacific sought to reach the net earnings of that Company after its consolidation by the Union Pacific. Justice Wheeler says of the income bondholder, "He has a lien upon this income which he has a right to pursue independently of any proceeding at law to reach other property." Also, "This income is in the hands of the Union Pacific Railway Company, never was the property of the Denver Pacific, and could not be reached by judgment against that Company."

Considering that this fund which Justice Wheeler says never belonged to the Denver Pacific was earnings of the Denver Pacific, the justice could not have more clearly expressed the radical difference between an income bond and a mortgage.

This idea is also clearly illustrated by Justice Wallace, in *Barry* vs. *Mo., Kans. & Tex. Ry. Co.*, Fed. Rep., May 4, 1886, which was a suit to compel the application of the net earnings upon the income bonds, in which he said that the Company must keep the requisite accounts to show the amount of net earnings for the purpose of having them applied upon the income bonds, and that it was the duty of the income bondholders' trustee to compel the Company to do this.

The same point was admitted by Justice Blatchford, in *Morgan* vs. *Union Pac. Ry. Co.*, 11 Fed. Rep. 692, where the right of the income bondholders of the Kansas Pacific to have the separate accounts of its earnings after consolidation with the Union Pacific was set forth by the Court.

The same point was even more clearly expressed by Justice Harland, in *Ketchum* vs. *St. Louis*, 101 U. S. 315, saying: "It was not a simple, naked covenant to pay out of a particular fund; but . . . . . operated as an equitable assignment of a fixed portion of that fund . . . . . an assignment . . . . . which the party holding the funds . . . . . could respect without liability to the debtor for so doing."

The same point was also set forth in the same case in the Court below, in *Ketchum* vs. *Pac. R. R.*, 4 Dill. 85, by Justice Dillon. This was a contract lien, although arising under a statute.

(D) An agreement setting aside net profits of real estate is an equitable assignment creating a lien upon the earnings and the property.

2 Story's Eq. Jur., § 1231.
Legard vs. *Hodges*, 1 Vesey, Jr. 477.

(E) An appropriation by agreement of a particular fund by one party for the benefit of another is an equitable assignment of the fund.

Ewing vs. *McArthur*, 1 Hump. 537.

(F) Such an assignment passes the fund, even as against the assignee in bankruptcy of the assignor.

Savings Bank vs. *Pub. Co.*, 3 Dill. 287.

(G) Corporation calls were protected against garnishment thereby, in *Pickering* vs. *Ilfracombe Ry. Co.*, 3 Law Rep. C. P. 235.

XVII.

MORTGAGEE'S LIEN.

(A) By the best authorities most income mortgages imply that possession shall be retained by the mortgagor. In such cases a specific lien is not attached to the earnings until possession.

(B) It is held, in the United States Courts, that a provision in an income mortgage authorizing the mortgagee to take possession after a default, implies that the mortgagor should have the right to the earnings until possession is taken.

[NOTE. — *Gilman* vs. *Ill. & Miss. Tel. Co.*, 91 U. S. 603, *Galveston R. R. Co.* vs. *Cowdrey*, 11 Wall. 459, *American Bridge Co.* vs. *Heidelback*, 94 U. S. 798, *Merchant's Bank* vs. *Petersburg R. R.*, 24 Petersburg L. J. 192, *M. V. & W. Ry. Co.* vs. *U. S. Ex. Co.*, 81 Ill. 534, were all income mortgages; but they all either contained provisions authorizing taking possession after default, or expressly reserved possession until default.

These provisions implied that the mortgagor should take the earnings, and the Courts placed the decisions upon this view, that the contract did not give the earnings until possession taken; but, besides this, a mortgage is a radically different thing from an equitable assignment, as it only conditionally, even, transfers the earnings.

Possession has nothing to do with the rights of a party who has an unconditional assignment of specific earnings, as has an income bondholder.

Galveston R. R. Co. vs. *Cowdrey*, 11 Wall. 459, was affirmed in *Dow* vs. *Memphis R. R. Co.*, 124 U. S. 652; but it was held in the latter that the mortgagor must account for the earnings from the beginning of a successful suit to recover possession.]

(C) Income mortgages may be made, if the parties so agree, by which the mortgagee will have a lien upon specific earnings prior to taking possession.

1 Jones on Mort., § 772.

2 Rorer on Railroads, pp. 1377, 1378.

XVIII.

FAILURE TO DECLARE INTEREST.

(A) This does not defeat our equitable title. The company, its volunteers and transferees, with knowledge, are liable, whether the interest is declared or not.

(B) "All agreements are considered as performed, which are made for a valuable consideration, in favor of persons entitled to insist upon their performance."

Story's Eq., § 64.

(C) This is shown in cases of preference dividends, payable out of net earnings. Though undeclared, they are still collectible in equity.

Nichols vs. *N. Y., L. E. & W. R. Co.*, 15 Fed. Rep. 575.
Boardman vs. *Lake Sh. & Mich. So. Ry. Co.*, 84 N. Y. 157.
Thompson vs. *Erie Ry. Co.*, 45 N.Y. 468.

(D) In *Mackintosh* vs. *Flint & P. M. R. Co.*, 34 Fed. Rep. 582, where the right of common stock to representation in a reorganized company depended on the prior payment of certain dividends on the preferred stock, it was held that the right to such representation was established by showing earnings sufficient to pay the requisite dividends, although such earnings had been wrongfully diverted, and expended in improvements.

See also,

Barry vs. *Missouri, K. & T. Ry. Co.*, Id. 829.

XIX.

DIVERSION OF EARNINGS.

(A) The divisional roads have taken the earnings without consideration. They are volunteers with notice.

(B) They stand in place of the Iron Railroad, and are chargeable as trustees.

Ritten vs. *Union Pac.*, 17 Fed. Rep. 480.
Morgan vs. *Union Pac.*, 11 Fed. Rep. 892.

Cases of income bonds of the divisional roads, where the income bondholders were allowed to follow the earnings into the hands of the consolidated companies.

Harrison vs. *Union Pac.*, 13 Fed. Rep. 522.

A case where a holder of guaranteed bonds of divisional road was allowed to follow the assets into the hands of the consolidated companies.

Skiddy vs. *At., Miss. & O. R. R. Co.*, 3 Hughes, 320, 354, 373.

A preference shareholder's right to the earnings of the divisional road held paramount to consolidated mortgages.

This right to follow diverted assets is shown by cases where a new corporation succeeds the old, taking its assets, but cannot divest the lien of the original corporation's creditors, for corporations, unlike individuals, hold their assets in trust.

Hibernia Ins. Co., 13 Fed. Rep. 516.
Brum vs. *Merchants Ins. Co.*, 16 Fed. Rep. 140.
Blair vs. *St. Louis*, 22 Fed. Rep. 36.

This point, that the lien under a trust adheres to the fund through all its diversions and transmutations, is shown under many cases of equitable assignments cited under prior topics.

(C) They are personally liable, and their property and roads are a substituted fund.

(D) As they were defendants in the foreclosure suit, and also in this suit, had the Court known that they had our money it would have taken from the fund under its control this money, and cancelled the small deficiency of first mortgage interest.

(E) What has been done with our money is a question of fact.

(F) If our money was used to pay mortgage interest, we are subrogated to the security, since "The mortgage security is chargeable . . . . . with . . . . . the fund thus improperly diverted."

Rex, in 22 Fed. Rep., p. 476.

(G) If our money, or any of it, was used for labor, supplies, machinery, or rolling stock, we have also an equitable lien upon the funds in the hands of the Court.

Purely equitable liens not resting on statutes have been held paramount to the mortgagees' liens in many cases. The Court has allowed the claims for labor, fuel, machinery, cash used to pay labor, ticket and freight balances due to connecting roads for periods of ninety days, six months, eight months, eighteen months, twenty-two months, and indefinite periods prior to the appointment of a receiver.

(H) If our money was not expended to pay interest, it was undoubtedly expended for the same class of items enumerated above.

(I) Our equitable lien is stronger than the liens in the above cases, because the lien men in those cases voluntarily advanced their money. These bondholders did not wish to advance their money, but it was fraudulently diverted against their consent.

(J) The Courts have decided that a railroad mortgage differs from an ordinary one in this circumstance. It is necessary to use funds to operate the road, preserve the franchise and good will, and thereby preserve the mortgage security, and the mortgage security is charged with a lien to restore the fund thus expended paramount to the lien of the mortgagees.

(K) This lien, as appears by the authorities, where equity demands it, extends, not only to the earnings, but also to the roadbed itself.

XX.

CONSOLIDATION.

(A) The lien of an income bondholder adheres to the net earnings after the consolidation in the same manner as it did previously, the new company being charged as trustees.

Ritten vs. *Union Pac. Ry. Co.*, 17 Fed. Rep. 480.
Morgan vs. *Union Pac. Ry. Co.*, 11 Fed. Rep. 692.

(B) The consolidation cannot extinguish the rights of the bondholders of the divisional roads.

Harrison vs. *Union Pac. Ry. Co.*, 13 Fed. Rep. 522.

(C) A preferred stockholder's lien was held superior to that of the subsequent mortgagee's of divisional road, in *Skiddy* et al. vs. *At., Miss. & O. R. R. Co.*, 3 Hughes, 320.

(D) Even common stockholders have been held to have liens in many cases.

In case of a consolidation, "Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund." Also, "Even the executory contracts of the defunct corporation are not extinguished."

Justice Swayne, in *Shield* vs. *Ohio*, 95 U. S. 319.

XXI.

TRUSTEE'S DUTIES AND LIABILITIES.

It is the duty of a trustee under an income mortgage to see that the proper accounts are kept by the company, so that the bondholders may receive the share of the net earnings which belongs to them.

Wallace, J., in *Barry* vs. *Mo., Kan. & Tex. Ry. Co.*, Fed. Rep., May 4, 1886.

(A) "It is the duty of the mortgage trustee to protect the security he has taken for the bondholders to the utmost of his ability."

Jones on R. R. Securities, § 357.

(B) And with the same vigilance and faithfulness with which he guards his own estate.

Jones Appeal, 8 Watts & Serg. 143.

And other cases.

(C) A failure to take active measures for the protection of his bondholders in a foreclosure suit is fraud, and ground to reverse the foreclosure decree.

Campbell vs. *R. R. Co.* et al., 1 Woods, 368.
Sahlgard vs. *Kennedy* et al., 1 McCrary, 291.
Simmons' Successor vs. *Taylor's Successor*, 23 Fed. Rep. 849.

And to remove trustee.

For allowing a committee of creditors to control the foreclosure suit, the trustees were charged with personal liability in *Merrill* vs. *Farmers' L. & Tr. Co.*, 24 Hun. 299.

(D) A series of cases may be cited where trustees were held personally liable for negligence and unfaithfulness.

A failure to take possession of trust property which was being misapplied; a failure to seasonably bring suit; consenting to injurious decree; failing to enforce his beneficiaries' rights; taking insufficient security; delaying seasonably to sell property,—are grounds of personal liability.

(E) The same facts which would render a trustee personally liable in damages are grounds to set a decree aside as fraudulent.

"This supineness . . . . . was really constructive fraud against the bondholders."

Bradley, J., in *Campbell* vs. *R. R. Co.*, 1 Woods, 368.

(F) The same trustee was acting in the case at bar for both classes of bondholders, and knew, or ought to have known, that our funds were being misapplied, and ought to have taken possession.

(G) The allegation of The Central Trust Company, in its bill of complaint, that no interest was due upon our bonds was fraudulent The Trust Company knew, or ought to have known, that the interest was actually earned, and that in equity it made no difference whether it was declared or not.

Trustees were charged with personal liability for failing to take seasonable possession of the trust property in *Freeman* vs. *Cook*, 6 Ired. (N. C.), Eq. 373.

Harrison vs. *Mock*, 10 Ala. 185.
Caffrey vs. *Darby*, 6 Ves. 488.
Beal vs. *Darden*, 4 Ired. Eq. 54.

In *Caffrey* vs. *Darby*, trustees allowed interest instalment after interest instalment to be passed without payment and without taking possession.

In *Cross* vs. *Petree*, 10 B. Mon. (Ky.), and in *Bentley* vs. *Shreve*, 2 Md. Ch. 215, the trustee was held liable for failing seasonably to bring suit.

In *Fenwick* vs. *Greenwell*, 10 Beav. 412, and in *Maitland* vs. *Bateman*, 13 L. J. (N. S.), Ch. 273, the trustee was held liable for not enforcing covenant in a marriage settlement, whereby property of his beneficiaries was lost.

In *Phillips* vs. *Phillips*, Freeman's chancery cases, 11, the trustee was charged for not selling trust property.

In *Ames* vs. *Parkinson*, 7 Beav. 379, and in *Walker* vs. *Simonds*, 3 Swans. 1, for not taking sufficient mortgage security.

In *Brice* vs. *Stokes*, 11 Ves. 319, and in *Lord Shipbrook* vs. *Lord Hinchinbrook*, 16 Ves. 477, trustees and executors were charged for the misapplication of trust funds by their co-trustee. In the first case, on the ground that they knew of the misapplication and ought to have interfered, but did not; and in the second case, on the ground that they might have known if they had endeavored to ascertain the facts, but did not.

Lord Eldon said (page 480), "These executors . . . . . ought at least to have made some inquiry," etc.

Story says that it is the duty of the trustee, "if he has not all the proper information, to seek for it, and, if practicable, to obtain it."

2 Story's Eq. Jur., 1275.

After a forfeiture has occurred, his duties become active.

Jones on R. R. Sec., 357.

"It is then required to act discreetly, as well as judiciously, in making the best use of the security for the protection of the beneficiaries."

Daniels, J., in *Merrill* vs. *Farmers' Loan and Trust Co.*, 24 Hun. 299.

The Court said, in *Beal* vs. *Darden*, 4 Ired. Eq. 54, in speaking of the trustee's neglect to look after property which he had reason to believe was likely to be misapplied, that it was "almost an abandonment of the property altogether."

The Central Trust Company, in this case, knew, or certainly ought to have known, of the misapplication of the earnings of the Iron Railroad, and of its own duty to prevent the same, and that a foreclosure in ten days would be fatal to the rights of its beneficiaries; yet it sought and procured such a foreclosure, and afterwards asked for the confirmation of the sale under the decree, as the crowning act of a series of faithless omissions and commissions; and this while having good reason to believe that the receiver's net earnings were sufficient at the date of the decree to pay the entire default, and that the road had been sold for a grossly inadequate price.

GEORGE W. MORSE,
KITTREDGE & WILBY,
Of Counsel for Plaintiff.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 324.

WILLIAM ROBINSON, APPELLANT,

v.

THE IRON RAILWAY COMPANY, JOHN C. COOMBS, THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY, AND THE CENTRAL TRUST COMPANY OF NEW YORK.

BRIEF OF THE IRON RAILWAY COMPANY AND JOHN C. COOMBS, Appellees,

In support of the Decree sustaining their Demurrers in the Circuit Court of the United States for the Southern District of Ohio, Western Division.

JOHN C. COOMBS,
CHAS. H. HANSON,
Attorneys for Appellees.

Supreme Court of the United States.

IN EQUITY.

No. 324.

WILLIAM ROBINSON, *Appellant*,

v.

THE IRON RAILWAY COMPANY, JOHN C. COOMBS, THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY, AND THE CENTRAL TRUST COMPANY OF NEW YORK.

BRIEF OF THE IRON RAILWAY COMPANY AND JOHN C. COOMBS, Appellees,

In support of the Decree sustaining their Demurrers in the Circuit Court of the United States for the Southern District of Ohio, Western Division.

STATEMENT OF CASE AND ANALYSIS OF BILL.

This bill is framed with a double aspect, or rather there are two bills in one. The complainant, in behalf of himself and such other of the second or income mortgage bondholders as may choose to come in within a time to be limited, asks specifically to have the sale of the Iron Railroad, made and confirmed under a decree of the Circuit Court in the foreclosure of the mortgages on said Iron Railroad, rescinded or set aside, on the ground of fraud or invalidity in the foreclosure proceedings; or, in the alternative, to be allowed to participate in the benefits of the purchase at such sale, on the ground of a trust or contract therefor existing between the respective committees of the first and second or income mortgage bondholders.

The mortgagor and its successors by consolidation, the mortgage trustee, and the purchaser at the foreclosure sale and his vendee are the parties and only parties made defendants. They are charged with independent wrongs; and reparation is sought from each respectively.

All substantially as follows: —

First, in its aspect as a bill to rescind and set aside the decree and sale.

This includes everything from the first of the bill to the beginning of the last paragraph on Record, p. 4.

It alleges in brief that on August 1, 1881, the Iron Railroad Company of Ohio made two mortgages, one of its property to secure the payment of $500,000 in first mortgage bonds and interest thereon at six per cent, and another of its income to secure income bonds to a like amount, both to the Central Trust Company of New York.

That afterwards, by consolidation, the mortgagor company became a part of the Toledo, Delphos & Burlington Railroad Company, which corporation, by a subsequent consolidation with, became a part of the Toledo, Cincinnati & St. Louis Railroad Company (p. 2, par. 2).

That in August, 1883, the Iron Railroad, together with the other branches of said consolidated Toledo, Cincinnati & St. Louis Railroad, went into the hands of a receiver on foreclosure proceedings instituted by said The Central Trust Company, for default in the payment of interest on its first mortgage bonds (p. 2, par. 3); in pursuance of which foreclosure proceedings, as the bill further on alleges (p. 5, pars. 5, 6), said railroad was sold at auction, for $500,000, to John C. Coombs, who transferred the same to the Iron Railway Company organized to receive it.

That the earnings of the road have been at all times since making said mortgages sufficient to pay all the interest on said first mortgage bonds and some interest on income bonds (p. 2, pars. 5, 6, 7, 8).

That the income bondholders had no voice whatever in said consolidations; and the Central Trust Company no legal notice thereof and never assented thereto or had any authority so to assent (p. 3, pars. 1, 2); and (upon information and belief) that both of said consolidations were illegal, collusive, fraudulent, and void (p. 3, par. 3).

That no company operating the road ever declared a dividend payable on the income bonds, though earned, so that income bondholders never had a right of entry for breach of the condition of their mortgage (p. 3, par. 4).

That the earnings which ought to have been applied to keep down the interest on the bonds have been largely diverted in consequence of said

consolidations and applied to pay the expenses of said consolidated companies, which earnings the complainant says should be refunded by the companies and applied to the payment of said interest; and that there should be a lien upon the property of said consolidated companies to secure this (p. 3, par. 5).

That the Central Trust Company, trustee under both mortgages, could have entered at any time after the failure to appropriate the earnings to pay the interest, and could have had the earnings of said road kept separate, and so could have recovered the interest on first mortgage bonds and would have had a surplus to devote to the interest of the income bonds (p. 3, par. 6); and was bound to carry out and execute the said trusts for the benefit of both classes of security holders.

That by reason of said Trust Company's inconsistent positions, the complainant and holders of bonds of his class had no fair voice in or notice of the proceedings to foreclose and sell the property; that the Central Trust Company gave them no such notice, so that they were absolutely unrepresented in the proceedings, and had no opportunity to present to the court the allegations in said bill (pp. 3, 4).

That the bill in foreclosure was duly filed, a receiver appointed, who was directed to keep a separate account of the earnings of each division of the consolidated companies (p. 4, par. 1); and that the report of the master, for five months of the receivership, shows net earnings of the Iron division to the amount of $33,716.37 (p. 4, par. 2); and that notwithstanding the amount of said earnings and that the income bondholders had no notice of such proceedings, the same were prosecuted to final decree of foreclosure and sale.

The bill also further on alleges as pertinent to this aspect of the case, —

That no demand was ever duly made by the first mortgage bondholders, or the Central Trust Company, for the interest on first mortgage bonds (p. 7, par. 4).

That the net earnings while in the hands of the receiver should have been applied to the payment of interest on first mortgage bonds and the balance left for the subject of an account between the receiver and income bondholders (p. 8, par. 3).

That the property ought to have been sold in Ironton, Ohio, if at all (p. 8, par. 2).

Second, in its aspect as a bill to enforce specific performance of an alleged agreement or trust.

This covers everything in the bill from and including the last para-

graph on Record, p. 4, through to the end of the first paragraph on Record, p. 7.

It alleges in substance that one Guild and four others, all citizens of Massachusetts, holders of said first mortgage bonds, became a committee and board of trustees of first mortgage bondholders under a contract whereby they were to purchase said Iron Railroad at the foreclosure sale, and that substantially all of the holders of said bonds signed said contract; but that the income bondholders were not invited to participate (p. 4, par. 4).

That said committee and board of trustees were authorized to negotiate for a participation by the income bondholders in the benefits of the trust, but not to make any contract to that effect without the sanction of a majority in value of the subscribing first mortgage bondholders (p. 5, par. 2; p. 27, par. 2).

That at a meeting of income bondholders held on the tenth day of June, 1884, a committee was appointed, consisting of the complainant in this suit and four other persons, to confer with said committee and board of trustees of first mortgage bondholders in regard to participation in the reorganization and to take steps necessary to protect the interests of income bondholders (p. 5, par. 3).

That on the nineteenth of the same month the committees of the two classes of bondholders met, and it was agreed between them that the income bondholders should participate in the reorganization and the benefits to be derived from the foreclosure sale and reorganization of said road, and that they, the income bondholders, should rank in the reorganization substantially as they ranked in the old one, subject to an equitable and fair division of the expenses, it being understood that a plan of reorganization should be submitted, and that said committee of first mortgage bondholders should purchase the property at the coming sale (p. 5, par. 4).

That the railroad was sold pursuant to decree, on the twenty-eighth of the same month, to the defendant John C. Coombs, acting in behalf of the committee and board of trustees of the first mortgage bondholders, for said sum of $500,000, which purchase the complainant assumed, and alleges he had reason to believe was for the benefit of both classes of security holders (p. 5, par. 5).

That the sale was confirmed on the eighteenth day of July following; and that thereafterwards, on the thirty-first day of July, the committee of income bondholders submitted to the committee of first mortgage bondholders a plan of reorganization, a copy of which is annexed, "Exhibit F" (p. 5, par. 6).

That in the meantime the income bondholders had had no notice of any

kind, either of the sale or confirmation, or the amount of the expenses, or any plan of reorganization, from the committee and board of trustees of first mortgage bondholders, who immediately after the sale, and in some matter preceding, organized the Iron Railway Company, with the intention of transferring the property to it (p. 3, par. 7); which last-named corporation was capitalized at $600,000, for the purpose of issuing stock, dollar for dollar, to the first mortgage bondholders for their bonds, unpaid interest, and expenses, practically absorbing the entire capital stock, without recognizing the rights or interests of the income bondholders (p. 6, par. 1).

That John C. Coombs transferred the property and railroad to the Iron Railway Company for the purpose aforesaid in fraud of the rights of complainant and other income bondholders, and in derogation and fraud of the negotiations which were pending between said committees (p. 6, par. 2).

That the Iron Railway Company was composed of said first mortgage bondholders, and that no new or innocent parties hold the stock thereof; and that the corporation and stockholders had full notice of the rights, claims, and interests of the complainant and all income bondholders (p. 6, par. 3).

That to prevent laches certain notices of the claims of income bondholders were published in the newspapers in Boston, Mass., where both classes of securities are largely or entirely held, from the first to the eighth of August inclusive (p. 6, par. 4); and that the committee of income bondholders served notice of the complainant's claim upon each of the committee and board of trustees of the first mortgage bondholders, August 5, and also upon the Iron Railway Company, upon its president and treasurer, August 5 (p. 6, par. 5); and also that on the sixth of August a majority of the said committee of income bondholders made further like publications, before the Iron Railway Company issued the stock (p. 7, par. 1).

The bill then alleges, apparently as pertinent to either aspect, as follows: —

That the Central Trust Company and the Toledo, Cincinnati & St. Louis Railroad Company have, as a matter of public record, alleged that the earnings of the Iron Railroad Company were sufficient, if kept separate, to pay the interest on its first mortgage bonds (p. 7, par. 2); and that a committee of first mortgage bondholders have repeatedly so stated in a public way, and that such claim was made by all first mortgage bondholders when the Toledo, Cincinnati & St. Louis Railroad Company first ceased to pay interest upon their bonds, but that they took no steps to remedy the same (p. 7, par. 3).

That some of the property claimed to have been purchased under the foreclosure sale is covered by the second mortgage and not by the first, and is claimed, or claimed to have been purchased, by the committee purchasing at the sale and to have been conveyed to the Iron Railway Company (p. 7, par. 5).

That the Iron Railway Company by virtue of its purchase claims the entire income, rents, and profits, and all the property and franchises of the Iron Railroad Company, though the same may be more than enough to pay the interest on the first mortgage bonds (p. 7, par. 6).

The complainant then asserts that there can be no valid decree of foreclosure and sale under any circumstances to deprive income bondholders from participating in the net earnings and income of the property after payment of the interest on said first mortgage bonds (p. 8, par. 1).

Complainant prays for a writ of subpœna, and for notice to income bondholders that they may come in.

"That the sale of said property, rights, interest, and franchises of the Iron Railroad Company to said committee of the first mortgage bondholders may be rescinded or so far qualified that it may be declared to be in trust for both classes of bondholders; that the sale to the said Iron Railway Company by said committee or board of trustees of the first mortgage bondholders be rescinded or be declared to be for the benefit of both classes of bondholders of the said Iron Railroad Company; that an account may be taken of the amount of earnings of the Iron Railroad Company applicable to the payment of the interest on its first and second mortgage bonds received since the road was placed in the hands of a receiver, and also that an account may be taken of the amount of earnings diverted by the consolidation prior to the appointment of a receiver, and of the amount of property under the control of court which ought in equity to be applied upon said bonds in lieu of said diverted earnings, and that the court will apply the same, first, in the payment of the interest now overdue upon the first mortgage bonds, and after that the balance, if any, of such property in payment of interest up to the specified rate of interest upon the second mortgage or income bonds;" and for general relief.

To this bill the Iron Railway Company and John C. Coombs demurred.

The cause came on for hearing in the Circuit Court in Ohio on the seventh day of April A.D. 1886, before the Hon. John Baxter, then circuit judge in that circuit; and was heard in argument, and the demurrers were sustained (p. 37).

Afterwards, on the twenty-first of May following, the complainant moved for leave to file a petition for rehearing, which on the twenty-

second of May was allowed, and on the same day the petition for rehearing was filed (p. 38).

The petition sets forth the absence of counsel especially prepared to argue the demurrer at the former hearing, surprise, and accident (pp. 39 and 40). This petition was heard on the first day of October, 1886, before Judge Jackson, who, it should be remembered, had at that time succeeded Judge Baxter as circuit judge in that circuit. Abundant counsel appeared on both sides, and the petition for rehearing was denied and the demurrers again sustained.

The record shows that said defendants the Iron Railway Company and John C. Coombs were heard not only in support of the sufficiency of the former hearing and the correctness of the judgment therein rendered, but also offered in open court, for the purpose of preventing any amendment thereafter to said bill by incorporating therein an offer to redeem said Iron Railroad free from the lien of the first mortgage or from the purchasers, if any, whenever in the future the circumstances of the parties may have become changed and said property may have increased in value, to waive all objection to said bill if said complainant would amend the same forthwith by making such an offer to redeem and accept a decree of the court limiting the time therefor, and on default in making such redemption to be forever barred and foreclosed of all right, title and interest in said property; and said complainant declined said offer.

BRIEF.

The railroad company and Coombs allege substantially the same causes of demurrer, which will be noticed in their order in the railway company's demurrer, as follows: —

I.

First. For that complainant is not entitled to any discovery or relief against either of these defendants.

For discovery the complainant lays no foundation, either in his own ignorance, or to charge the conscience of the Iron Railway Company or Coombs, but only to charge the

committee and board of trustees of the first mortgage bondholders on an alleged agreement with the committee of income bondholders, neither of which committees, and no member of either, except the complainant, and he not as representative of his committee, is a party to the suit.

The demurrer for want of equity supports every other cause of demurrer, but is especially relied on, (1) Because of the absence, in the aspect of the bill as a bill to set aside the foreclosure decree and sale, of any allegation of actual fraud or other ground upon which an original bill for such purpose can be maintained. This reason and the law in support of it are considered below, under Third, subdivision (*b*). (2) Because of the absence of any offer to redeem. This also is considered below, under Third, subdivision (*d*). (3) Because of the absence of any allegation of consideration or mutuality in the alleged agreement between the respective committees. This also is considered below, under Fifth, subdivisions (*d*) and (*c*).

This cause of demurrer is further especially relied on in view of two facts: one that the complainant does not allege or pretend that the property was sold or bought in for less than it was actually worth, but everywhere in his bill admits that the claim of the first mortgage bondholders upon the property and proceeds is superior to his own; the other that the property brought more than the complainant thought it was worth, so that he was not injured by not protecting it at the sale. This is apparent from his refusal to redeem when the property was tendered in open court for redemption after foreclosure, the amount of the prior bonds and the price paid being the same.

II.

Second. The bill is multifarious:

(a) For that, in brief, the complainant seeks both to have the foreclosure sale and decree set aside and to participate in the benefits of the purchase.

(b) For that the bill is exhibited against different parties for distinct causes.

On the first (*a*), the above analysis of the bill is the best argument. It is true the first of the prayer for relief is framed in the alternative either to rescind the sale or to share in the purchase.

But it asks more than that, as the second cause of demurrer (*b*) shows:

The complainant seeks to establish a lien on the property of the consolidated companies to secure the repayment of the earnings wrongfully diverted from the payment of interest and to have the same applied thereto, and thereby to reopen the foreclosure. That is a bill in itself, and, if successful, gives the first mortgage bondholders their unpaid interest and the road to the company; but if it fails, it is not equitably alternative in cause or effect to affirm an illegal foreclosure for the complainant's benefit on the ground that there has been a breach of an alleged reorganization agreement between two committees neither of which is a party to the suit.

Again, these diverted earnings is the only source to which the complainant points for the payment of interest confessedly in default, but he does not allege that there is any such property available for that purpose, or offer to pay the interest otherwise. To supplement this defect he says that

the Central Trust Company has administered its trust unfaithfully and might have intervened to secure the payment of interest and so prevent foreclosure. That also would be a bill in itself; and again, if it fails of a remedy against the trust company, is it an alternative equivalent for the court to say to first mortgage bondholders, that because their interest cannot be restored they shall be charged with a trust that shall cut down their principal?

Still further, the complainants allege (p. 8, par. 2) that the terms of the mortgage required a sale in Ironton, and that the sale, having taken place in Cincinnati, is void. If that be a good cause, it also should be a bill and sufficient; but none of the consequences sought flow from it except the mere setting aside of the sale in order to have a resale in Ironton.

Finally, the complainant alleges (p. 8, par. 1) that there can be no valid decree of foreclosure and sale which will under any circumstances deprive income bondholders from participating in the net profits and income after payment of the interest upon the first mortgage bonds. In that case this should be a bill against the purchasers only for an accounting.

It is not ventured to argue multifariousness as a principle of law at any length to this court; but one decision here seems to afford a controlling precedent for the effect of such inconsistency as the alternative aspects of this bill present.

The two cases presented by a bill framed with a double aspect must afford foundation for the same relief. Thus, a bill which seeks a rescision of a contract for fraud, or, in case it be found valid, a specific performance of it, is bad.

Shields v. *Barrow*, 17 How. 130.

"The bill . . . presented not only two aspects, but two diametrically opposite prayers for relief, arising upon necessarily inconsistent cases; the one being that the court would declare the contract rescinded for imposition and other causes; and the other, that the court would declare it so free from all exception as to be entitled to its aid by a decree of specific performance."

"A bill may be originally framed with a double aspect, or may be so amended as to be of that character. But the alternative case stated must be the foundation for precisely the same relief; and it would produce inextricable confusion if the plaintiff were allowed to do what was attempted here."

CURTIS, J., in id. pp. 143, 144.

III.

While the bill is multifarious, it nevertheless cannot be maintained upon either ground advanced.

Third. In its first aspect, as a bill to rescind the sale, it cannot be maintained:

(a) For that said complainant has not been injured by said proceedings.

He himself maintains (p. 8, para. 1) not only that income bondholders are not affected by the proceedings complained of, but that they cannot be cut off by any proceedings. They therefore should pursue their remedies under their mortgage by taking possession of the property or otherwise.

(b) For that the complainant might with diligence have prevented or remedied all the injury he has sustained, if any, by intervening in the foreclosure suit.

The consideration which a bondholder will receive in a court of equity, on foreclosure proceedings by a trustee in his behalf, is well known. He is a party of right for the protection of his interest when endangered; and if his trustee refuses to act or acts unfaithfully, the bondholder on proper showing can make the trustee a defendant, or may be given control of the suit. If, therefore, the proceedings threaten him, he should intervene and correct them in the foreclosure suit.*

Wiltsie on Mort. Forecl. p. 644, and cases.

The court cannot entertain two concurrent causes between the same parties in interest for the purpose of setting aside in one all that it decrees and establishes in another.

Campbell v. *R.R. Co.*, 1 Woods, 368.
Campbell v. *R.R. Co.*, 2 Woods, 263.
Anderson v. *J. P. & M. R.R. Co.* 2 Woods, 628.

The complainant cites no injury, and shows no equity for disturbing the decree and sale, even if there were any law which would support him upon a proper showing.

Ordinarily, if there is nothing to prevent an application in the original suit, an original bill for this purpose cannot be sustained.

Brown v. *Frost*, 10 Paige, 243.

* Since the record in the original case may by the terms of this bill be shown, but is too bulky to warrant printing for the present purpose, it ought to be permissible to say that this complainant did intervene therein on a petition substantially like this bill, but the foreign matter of the agreement between the two committees being introduced, exceptions to the petition were sustained. The petitioner should have amended by striking out everything except such averments as went to invalidate foreclosure and stayed in that case.

Graham v. *B. H. & E. R.R. Co.*, 118 U.S. 162, head note and opinion 177-8.
Jones on Mort. (2d ed.) 1668.

The only apparent ground upon which a bill at all like this could be maintained, if indeed it be not an essential ground, in fact or construction, upon which every original bill to set aside a sale under decrees in proceedings to foreclose can be filed and maintained as a matter of right, and without leave of court being first obtained, is fraud; and this upon the principle that fraud will vitiate any proceeding.

When the proceedings are regular and free from fraud, and the party is only equitably entitled to relief, his only remedy is by motion in the foreclosure suit, addressed to the discretion of the court, to open the bidding or set aside the sale.

Jones on Mort. sec. 1668.
McCotter v. *Jay*, 30 N.Y. 80.
Smith v. *Am. Life Ins. Co.*, Clarke Ch. 307.
White v. *Coulter*, 1 Hun. 357.

The application may be made by any one injured by the proceedings under the decree, although he is not a party to the suit.

Jones on Mort. sec. 1668.

"The bill to set aside a decree for fraud . . . must state the decree, and the proceedings which led to it, with the circumstances of fraud . . . on which it is impeached."

Story Eq. Pl. sec. 428.

"The bill is full of the words 'fraudulent' and 'corrupt' and general charges of conspiracy and violations of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions

to which they refer are such as in their essential nature constitute a fraud or a breach of a trust, for which a court of chancery can give relief. *Ambler* v. *Choteau*, 107 U.S. 590."

Van Weel v. *Winston*, 115, U.S. p. .

A bill to set aside a decree for fraud may be filed without leave of court being first obtained, the fraud used in obtaining the decree being the principal point in issue, and being necessary to be established by proof before the propriety of the decree can be investigated.

Story Eq. Pl. sec. 426.

This bill to set aside a final decree alleges no fraud by any party to the suit in which it was entered, or that any person whom the complainant charges with fraud was a party to the suit or in any way influenced or procured the decree, or that the decree was any part of a fraud in any respect.

Indeed it is not even alleged that, outside of the record, the first mortgage bondholders were guilty of any fraudulent practices on the income bondholders whereby the latter lost any right to bid at the sale. On the contrary, it is apparent from their emphatic position that no foreclosure proceedings can, under any circumstances, cut off their right (p. 8, par. 1), and from their plan of reorganization that it never entered their heads to bid or to contribute anything to the purchase. They still claim their right to the income without doing so; and at the hearing in the Circuit Court declined the offer to allow them to redeem.

This law should dispose of all the substantial allegations in the bill, which could constitute any invalidities in the foreclosure proceedings and sale.

None of these allegations charge *fraud in fact;* and only one of them could possibly have been considered by the complainant as amounting to even constructive fraud. Those allegations are, —

1. That by reason of the inconsistent positions of the Central Trust Company as trustee under both mortgages, the complainant and other income bondholders had no fair voice in or notice of the proceedings to foreclose and sell the property, and were absolutely unrepresented, and had no opportunity to present to the court the allegations in said bill (p. 3, par. 7).

There is more than one answer to this, in behalf of these respondents.

It is to be noticed that no collusion on the part of the trustee is charged. Nor is it alleged that the trustee, so far as it did or could represent income bondholders, was unfaithful. It is not an allegation of *fraud in fact* or of gross neglect.

It is to be further noticed that the mere charge of inconsistency and non-representation is not sufficient, in and of itself, to warrant the court in reopening the foreclosure proceedings. The complainant must further show that if he had had a voice, of which he was deprived, he could have said something which would have barred the foreclosure; for he admits that there was a default in the condition of the first mortgage, and that the foreclosure proceedings were properly instituted. What his defence would have been in that suit should also appear here. Indeed he says he would have presented to the court the important facts and allegations in this bill. Of course his mere intervention would have cured any defect resulting from inconsistency of the trustee's positions; and that remedy for that defect was his

and his alone. If want of notice excuses him for not having resorted to it, he must show that if he had done so he could have set up some other defence than the mere inconsistency; that is, that the other allegations in this bill are sufficient in law to have barred foreclosure. These appellees herein consider them all and respectfully submit that they are not.

Again, the Central Trust Company was trustee under both mortgages, but under the first before it was under the second; and if its action in foreclosing the first mortgage was inconsistent with its trust in behalf of income bondholders, it was still no more than its duty to first mortgage bondholders; they had full notice of the situation, as their organization of a committee shows, and should have intervened. It was not in the power of the first mortgage bondholders to make them do so, nor to control the number or limit the trusts which the Central Trust Company might assume.

Finally these foreclosure proceedings were not in behalf of one class of bondholders against another, but in behalf of both according to their priorities. The bill does not deny this, but admits what the fact was, that the Central Trust Company filed its bill to foreclose the *mortgages* upon the Iron Railroad (p. 4, par. 1). That is, both of the mortgages. That is exactly what the trustee should have done.

The allegation of inconsistency in the trustee's position is idle. Every mortgage trustee represents two interests, both that of the mortgagor and the creditor.

A trustee in a deed of trust is the agent of both parties in all cases, and bound to act impartially between them. He is bound to bring the estate to the hammer for the best interest of his *cestuis que trust*, and should use all reasonable diligence to obtain the best price for the land.

Livey v. *Winton*, 30 W.Va. 554.

If an individual in his private capacity have two mortgages upon the same property, he not only can, but must include both in any foreclosure proceedings.

Roosevelt v. *Ellithorp*, 10 Paige, 415.
Galveston R.R. Co. v. *Cowdrey*, 11 Wall. 459.
Homœopathic Mut. Ins. Co. v. *Sixbury*, 17 Hun. 428.
Oconto County v. *Hall*, 42 Wis. 59.
Demorest v. *Berry*, 16 N.J. Eq. 481.
Hawkins v. *Hill*, 15 Cal. 499.
Hall v. *Bumber*, 10 Paige, 296.
See also 15 Ala. 472.

So trustees under two mortgages relating to the same property may unite in filing a foreclosure bill.

Mobile & Cedar Point R.R. Co. v. *Talman*, 15 Ala. 472.

These cases may be coupled with another well-established proposition, to wit, in proceedings to foreclose under bonds and mortgage to a trustee, if the trustee is a party, the bondholders need not be.

Corcoran v. *Chesapeake & Ohio Canal Co.*, 94 U.S. 741.
Shaw v. *Norfolk County R.R. Co.*, 5 Gray, 162.
Campbell v. *R.R. Co.*, 1 Woods, 368.
Campbell v. *R.R. Co.*, 2 Woods, 263.
Board of Supervisors of Iowa County v. *Mineral Point R.R. Co.*, 24 Wis. 93.
McElrath v. *P. & S. R.R. Co.*, 68 Pa. St. 37.
Shaw v. *R.R. Co.*, 100 U.S. 605.
Lambertville Natl. Bk. v. *McCready Bag and Paper Co.*, 1 L.R. A. 334.

And if the trustees of a mortgage on a railroad are parties to a suit, a decree rendered in the case is as binding on the bondholders secured by it as if they had been made parties, unless they can show some fraud practiced upon or connived at by the trustees themselves.

Campbell v. *R.R. Co.*, 1 Woods, 368.
Huntington v. *Little Rock, &c., R.R. Co.*, 3 McCrary, 581; (s.c.) 16 Fed. Rep. 8.
Meyer v. *Utah & Pleasant Valley R.R. Co.*, 3 Utah, 280.

These propositions, together, lead to the conclusion that a trustee under two mortgages at least can proceed as effectively in one suit as can any one in an individual capacity.

This view is further directly supported, if not established, by the following cases, each of which was an action of foreclosure by a trustee under two mortgages: —

Farmers' Loan & Trust Co. v. *Green Bay & Minn. R.R. Co.*, 10 Biss. 203.
Simmons v. *Taylor*, 23 Fed. Rep. 849, 852–5, 856.
First Natl. Ins. Co. v. *Salisbury*, 130 Mass. 303.

But even if this be not the law, the sale was nevertheless good, and one of these results is inevitable, that the complainant if he is foreclosed should have intervened to prevent it, and if not he has no occasion for or right to a bill to set aside the sale or to charge anybody with a trust for his benefit, for his interests have not been affected.

Childs v. *Childs*, 10 Ohio St. 339.

2. The allegation or implication that inasmuch as the Central Trust Company was trustee under both mortgages, it should, immediately upon the non-payment of interest on

first mortgage bonds, have entered nominally in behalf of first mortgage bondholders, but really in the interests of second or income mortgage bondholders, and should have demanded of the consolidated company the income of the Iron Railroad division, had the net earnings kept separate, and applied them to the payment of interest on first mortgage bonds, because it might thereby have saved a default and have prevented or defeated a foreclosure.

This requires the Trust Company not merely to be faithful to its second trust, but to use its first trust for the benefit of the second. The fact that the Trust Company occupied the position of mortgage trustee under both mortgages gave it no greater rights as trustee for income bondholders than if it had been mortgage trustee under the income mortgage alone. If there had been two mortgage trustees, it would be absurd to say that the trustee under the income mortgage could have insisted on the first mortgage trustee's entering to collect interest and prevent default, or could have itself demanded of the consolidated company the income of the Iron Railroad division for and in behalf of the first mortgage trustee. Unless the mortgagee, or other party *entitled to* the same, asks for the income of the division covered by his mortgage, the road must and will be run as one concern and equally for the benefit or loss of all parties interested.

Martin v. *Buffalo, N. Y. & Phila. Ry. Co.*, 1 Ry. & Corp. L.J. 170.

Lambertville Nat'l Bk. v. *McReady Bag & Paper Co.*, 1 L.R. A. 334.

Now down to the time of the beginning of the suits to foreclose it is clear that no trustee for income bondholders, however independent, could have moved in their behalf;

for that there had been no default in the performance of the condition of the income mortgage upon which any trustee for the income bondholders could have entered prior to that time, is expressly and unqualifiedly alleged in the bill.

As to the claim for income after that time the case stands thus: it is practically admitted that proceedings were instituted in behalf of both mortgages. It is not denied that thereafterwards the trustee of both mortgages did all it could to secure the income; nor is it shown or alleged that any other trustee could have succeeded any better in such an endeavor. And it is not shown that the whole amount of the net earnings that came to the receiver was sufficient to have paid the interest on first mortgage bonds then in default.

3. The allegations of the earnings of the road in the hands of the receiver, and that the same should have been applied, first, to the payment of interest on first mortgage bonds, and the balance left for an account with income bondholders (p. 8, par. 3).

Perhaps a simple and complete answer to this is, that the bill sufficiently shows that even if this had been set up in the original suit, the amount was not sufficient for the purpose, nor to prevent a foreclosure.

It is true that large earnings are alleged for three years (p. 2, par. 6); but it is also true, as alleged, that these earnings were largely diverted by the consolidation and applied to pay the expenses of the consolidated companies (p. 3, par. 5); and the bill generally complains that the trustee did not intervene to prevent this diversion; the complainant himself seeks a lien upon the property of those companies to secure the refunding of these diverted earnings and the application to pay interest in default.

The whole amount of the earnings which according to the bill came to the hands of the receiver down to April 1, 1884, is $33,716.37. For how long a period interest on first mortgage bonds was defaulted the bill does not allege, but the Exhibit Copy of First Mortgage (Record, p. 21, par. 3) shows that foreclosure proceedings could be not instituted until after six months' default in the payment of interest. Wherefore, there must have been at least $30,000 due when the bill was filed, and $15,000 on the 1st of February, 1884, making at least $45,000 due at the time of the alleged net earnings of $33,716.37.

It is not denied that the complainant and income bondholders had just as much notice of these proceedings as the first mortgage bondholders. They had the same trustee. And this court knows from the many records already before it, and will further know from the records still coming, that many mortgage divisions of the Toledo, Cincinnati & St. Louis Railroad went into the hands of a receiver at the same time; indeed it is so alleged in the bill.

It is not alleged that the first mortgage bondholders or trustee consented to the diversion of the earnings of the Iron Railroad by the receiver; nor is it denied that they at all times tried to prevent such diversions and to recover them. And it is admitted that they never received them.

The fact that the property earned enough to pay interest in the hands of a receiver, if not collectable by or paid to the mortgagee, is no reason why there should not be a foreclosure for the breach.

Martin v. *Buffalo, N. Y. & Phila. R.R. Co.*, 1 Ry. & Corp. L. J. 170.

The many decisions in the late Wabash cases have made familiar the law, that in proceedings, controlled by junior

incumbrancers, to foreclose mortgages on consolidated railroads, the court can do what it sees fit with the income of the different divisions, and apply the income to the payment of rent to lessors, or of interest on prior incumbrances or not, but generally will apply it for the good of the whole system until the party entitled to the income moves in his own behalf, which the court will allow him to do.

Central Trust Co. v. *Wabash*, &c., 34 Fed. Rep. 259, 265, 266, 267.
Same v. *Same*, 30 id. 332, 334.
Same v. *Same*, 29 id. 618, 625–6, 628.

And nothing is better demonstrated in the history of railroad foreclosures in the federal courts than that a party who does not seasonably intervene for the protection of his interest, cannot come in after the earnings are all gone in maintaining the operation of the franchise and property, and found a remedy upon theoretical rights to the earnings that are gone, or on theoretical possibilities of protection or restitution.

Miltenberger v. *Logansport Ry. Co.*, 106 U.S. 286.
Union Trust Co. v. *Ill. Midland R.R. Co.* 117 U.S. 434.
Burnham v. *Bowen*, 111 U.S. 776.
Farmers' L. & T. Co. v. *Mo., I. & N. Ry. Co.*, 17 Am. and Eng. R. Cas. 314.

4. The allegation that the first mortgage bondholders never made any demand for their interest.

This might be an objection to a sale by the trustee under the power in the mortgage, like a sale elsewhere than in Ironton (see post 6). But no demand was necessary to a

valid sale under decree in proceedings to foreclose. The commencement of the suit itself is a sufficient demand.

Wiltsie on Mort. Forecl. secs. 35, 282.
Jones on Railroad Secur. sec. 217.

If this allegation is made as a charge of negligence against the first mortgage bondholders from which it is just to deprive them of their interest, it is answered by the other allegations of the bill that the consolidated companies actually diverted the earnings; wherefore it is shown that a demand would have been useless.

If the allegation means that there was no valid foreclosure for want of a demand, the answer is clearly in the above assigned cause of demurrer, that the foreclosure should have been prevented and not be set aside. Certainly that matter, so far as necessary, was conclusively settled in the foreclosure suit.

5. The complainant's allegation that he and other income bondholders had no voice in the consolidations, and that the mortgage trustee had no notice thereof or authority to assent thereto, amounts to nothing. Neither of these things were requisite to the validity of the consolidations. A mortgagee's lien upon what was the separate property of the road remains the same after as before consolidation. No law or statute is recited that gives a mortgagee any voice in the matter.

And complainant's allegation that the consolidations were illegal, collusive, fraudulent, and void, is an allegation of "mere words, in and of themselves, and even as qualifying adjectives of more specific charges . . . not sufficient grounds of equity jurisdiction." It is not alleged that the consolidations were collusive and fraudulent as against the complain-

ant; and wherein they were illegal, collusive, fraudulent and void, is not set forth. Whatever the fact may be, there is no allegation that charges first mortgage bondholders with any responsibility for or complicity in them.

6. The allegation that the property should have been sold in Ironton, Ohio, if at all.

That is true of a sale by the trustee, without foreclosure, by virtue of the power contained in the mortgage; but the court, in ordering a sale in proceedings to foreclosure the mortgage, could direct such matters without regard to such provisions.

Farmers' Loan & Trust Co. v. *Green Bay & Minn. R.R. Co.*, 10 Biss. 203.
Michie v. *Jeffries*, 21 Grat. 334.
1 Rorer on Railroads, 271, and note.
3 Woods Railway Law, 1637.

In other words, the mortgage power of sale is simply a cumulative remedy given to the mortgagee, and does not affect the jurisdiction of the court.

Jones on Mort. sec. 1773, and cases.
Jones on Ch. Mort. secs. 777, 778.
Wiltsie on Mort. Foreel. sec. 264.
Cormerais v. *Ganella*, 22 Cal. 116, 124, 125.
Walton v. *Cody*, 1 Wis. 420.
Packard v. *Kingman*, 11 Ia. 219.
Green v. *Gaston*, 56 Miss. 487.
See also *Heyward* v. *Judd*, 4 Minn. 483, 495.

(*c*) The cause of demurrer assigned under this division, that the complainant has a remedy at law against the Central Trust Company for all the injury he has sustained, will

not be pressed. These respondents do not find that he has been injured.

NO OFFER TO REDEEM.

(*d*) This cause of demurrer, that the complainant does not offer to redeem, is especially relied on, since the entry in the Circuit Court denying the petition for rehearing for that reason as a complete answer to all equity in the bill in any aspect.

In the argument on that motion these respondents, being the purchasers and owners, and having all of the first mortgage bonds, openly offered to waive all objections to the bill and allow the complainant to redeem, if he would amend his bill by incorporating an offer to do so, which he declined to do (p. 41).

The court is asked to look at each aspect of the case in the light of this record.

The complainant admits the priority of the first mortgage; that there was a breach; that the interest is overdue and unpaid; that the property was sold in pursuance of foreclosure proceedings in behalf of both mortgages; and he does not deny that it brought all that it was worth; yet he asks that that sale be set aside, but will not even as a matter of pleading offer, if it be done, to redeem, nor does he so much as offer to pay the overdue interest. To what end, then, should the sale be disturbed? Certainly the court does not sit for the mere accumulation of business.

That the complainant's prayers are inequitable and that his object is to get something for nothing, appears still more clearly in the light of his refusal to redeem when his bill is viewed in its second aspect, that in which he asks to be allowed to participate in the benefits of the purchase and

reorganization on the ground of a trust or agreement therefor.

That agreement, as he alleges, was as follows: —

"It was then and there agreed by the said committee or board of trustees of the said first mortgage bondholders that the said second mortgage bondholders should participate in the reorganization and benefits to be derived from the foreclosure sale and reorganization of said road; that they should rank in the reorganization substantially as they ranked in the old one."

What that amounted to in the mind of the complainant is disclosed in the plan submitted, "Exhibit F" (p. 28), which would load the road with at least $1,225,000 in bonds and stock, but concedes to the first mortgage bondholders a first lien to the amount of their old bonds, unpaid interest, and expenses; which sum the bill says (p. 6, par. 1) exhausts the capital stock of $600,000 for which the property was actually reorganized, and therefore amounts to that sum.

Wherefore it is submitted that the offer to allow redemption was better than the alleged contract or trust, since it was for a much less sum than the amount of the securities which complainant concedes should be entitled to priority and belong to first mortgage bondholders.

A bill to set aside a sale for irregularity, where the sale was made *under the power in the mortgage*, must contain an offer to redeem, and is demurrable if it does not.

Tiedeman on R. P. sec. 364, *n*, and cases.

In proceedings *on a summary application*, in the original suit, to have the sale set aside, if the application is granted the purchaser is entitled to be restored to the same position he occupied before the purchase, and is entitled to be reim-

bursed for the amount paid on the purchase. (*Trotter* v. *White*, 26 Miss. 88.) The proper terms to be imposed depend, of course, upon the circumstances of each particular case. The *bona fide* former purchaser must be fully and liberally indemnified for all damages, costs, and expenses to which he has been subjected. (*Duncan* v. *Dodd*, 2 Paige Ch. 99; *May* v. *May*, 11 Paige Ch. 201, 204; *Re Lloyd*, 11 Fed. Rep. 587.) These include the deposit or percentage paid by him on the sale (*Reyner* v. *Selms*, 52 N.Y. 589), the interest on his deposit and on as much of the purchase money as he has kept on hand ready for payment, together with all the reasonable costs and expenses which he has paid or been subjected to in opposing the application for a resale.

Wiltsie on Mort. Foreel. pp. 664, 665.

"The purchaser had a right to claim a return of his purchase money and interest, which the order appealed from directs the respondent to pay."

May v. *May*, 11 Paige Ch. p. 204.

Where an increase offer is made, a sale will not be set aside when there is no security that the proposed bid would be made good by a payment of the money, and no offer to reimburse for the costs and expenses of the present sale.

Duncan v. *Dodd*, 2 Paige Ch. 99.
State Bank v. *Green*, 11 Neb. 309.
White v. *Coulter*, 3 Thomp. & C. 615.
Gardner v. *Schermerhorn*, Clarke Ch. 103.
See *Buffalo Sav. Bank* v. *Newton*, 23 N.Y. 160.
Wakeman v. *Pierce*, 3 N.Y. 334.

But *this is an original and independent proceeding* to set

aside a sale made under the decree of the court in the foreclosure proceedings; and the rights of the parties are analogous to those in proceedings to set aside a sale made under the power contained in a mortgage. Hence, unless something appears to the contrary showing that such a requirement would be inequitable, the complainant should not be allowed to proceed without giving security that he will redeem, and certainly if he will not even offer but refuses to do so on a tender of the property.

Childs v. *Childs*, 10 Ohio. St. 339.

Fourth. That the bill does not allege any privity with or duty or liability to the income bondholders on the part of the first mortgage bondholders, or any common interest between the holders of said classes of securities.

This is practically admitted in the bill and by the complainant in setting up the organization of a committee of income bondholders to protect their interests on the one part, and in the quotation from the articles of association of first mortgage bondholders on the other, which contemplates that an agreement or contract between the holders of both classes of securities would be necessary to give them any community of interest; and one half of the bill, that is, the whole case in the second aspect of the bill, is founded upon a breach or disregard of an alleged understanding or agreement between the respective committees. This being so, if Coombs bought for the first mortgage bondholders they acquired a good title. It has been repeatedly held that an association of bondholders who buy at a foreclosure sale are *bona fide* purchasers.

Railroad v. *Howard*, 7 Wall. 392.
Vose v. *Cowdrey*, 49 N.Y. 336.
Ashurst's Appeal, 66 Pa. St. 290.

Finally, the second aspect of the bill defeats its first.

By the subsequent allegations, wherein the plaintiff sets up his participation in an agreement to share in the benefits of the forecloseure, he is estopped from denying its validity.

Cranshay v. *Souter*, 6 Wall. 739.
Smith v. *Hodson*, vol. II., pt. 1, Sm. L.C. 124.
Birch v. *Wright*, 1, T.R. 378.
Shields v. *Barrow*, 17 How. *ante* p. 10.

IV.

The bill in its second aspect, as a *bill for specific performance* of the alleged agreement between the two committees, or to charge the purchasers with a trust for the complainant's benefit, cannot be maintained.

Fifth. For that as to so much of it as rests upon an alleged agreement or understanding on the part of Guild and others, committee and board of trustees of the first mortgage bondholders, it appears —

THE CIRCUIT COURT HAD NO JURISDICTION:

(*a*) *For that all the members of said committee are necessary parties, and none of them are made parties defendant in said bill.*

(*b*) *For that all the members thereof and said complainant are citizens of the commonwealth of Massachusetts, and the federal court had no jurisdiction to enforce said alleged agreement.*

These two grounds may be considered together.

The complainant says the alleged agreement was made by

and between the committee of income or second mortgage bondholders on the one part, and the committee and board of trustees of first mortgage bondholders on the other. Any suit to enforce specific performance of that agreement, therefore, should be, in form at least, by and between the respective committees, or by and between the respective classes of bondholders.

The parties to a contract are necessary parties to a suit to compel specific performance of it.

> Fry on Spec. Perf. (3d ed. Am. notes) secs. 140 *et seq.*

But the complainant is not the committee of income mortgage bondholders, nor the majority, delegate, assignee, or attorney of it, and does not purport to bring his bill for said committee, nor otherwise than in his individual capacity. And it is a comment upon the equity of his bill that only a majority of what was a committee of income bondholders submitted any plan of reorganization under the alleged agreement therefor; and not one of them now stands with the complainant.

Nor is the bill brought in behalf of second or income mortgage bondholders as a class, but only for such as may come in; for the complainant prays that notice may be issued to all said income or second mortgage bondholders, and that the time may be limited within which they may appear (p. 8, par. 5).

Nor, on the other hand, is the committee and board of trustees of the first mortgage bondholders, nor any member thereof, joined as a party defendant. The Iron Railway Company is not identical as a party with the committee and board of trustees of first mortgage bondholders, nor is it so regarded in complainant's bill. (See p. 8, par. 5.) If it

were identical, that committee would be the proper and the only party necessary to be made defendant.

Fry on Spec. Perf., *ubi supra*.

Nor does the bill purport to be brought against first mortgage bondholders as such.

Again, the bill in this aspect presents more than a doubt of the jurisdiction of the court. The merit of the whole controversy is between the first and second mortgage bondholders; and the complainant seeks to charge the purchaser, John C. Coombs, and the Iron Railway Company, upon the express and single ground that they are mere nominal representatives of first mortgage bondholders, with whose committee he says the reorganization agreement was made. Jurisdiction founded upon citizenship must expressly appear in the bill; but this one, in this aspect, for the enforcement of the agreement between the two committees, not only fails to show that the parties to any meritorious controversy are citizens of different states, but practically alleges the contrary, for though brought in behalf of all income bondholders as a class if they choose to come in against the representatives of all first mortgage bondholders, it expressly alleges, as a reason for the publication of notice in Boston, Mass., "that both classes of securities are largely or *entirely* held there" (p. 6, par. 4).

NO CASE FOR SPECIFIC PERFORMANCE.

(c) *For that said alleged agreement is not sufficient in form or certainty to permit the enforcement of the same or to warrant any recovery of damages on account of any breach thereof.*

This cause of demurrer embraces two propositions: (1)

that the complainant, for the reason assigned, states no case for specific performance; and (2) that the court ought not to retain jurisdiction to award damages.

(Subdivisions *d* and *e*, hereinafter considered, contain additional reasons in support of the first proposition. And as the second proposition follows, in part at least, as a matter of law from the establishment of the first, it will not be taken up until after a consideration of the reasons in subdivisions *c*, *d*, and *e*, respectively, in support of the first proposition.)

The agreement was not in writing; in fact it is not alleged that any terms of any agreement were arrived at, but only —

"It was agreed . . . that the said second mortgage bondholders should participate in the reorganization and the benefits to be derived from the foreclosure sale and reorganization of said road; that they should rank in the reorganization substantially as they ranked in the old one, subject to an equitable and fair division of expenses, it being understood that a plan of reorganization should be submitted, and that said committee of said first mortgage bondholders should purchase the property at the coming sale."

This understanding is further explained by the later allegation that —

"On the thirty-first day of July, 1884, the said committee of the second mortgage bondholders submitted to the committee of first mortgage bondholders a plan for reorganization, a copy whereof is" annexed to said bill.

It may be noticed that, as to matter of form, such an agreement would be within the statute of frauds.

Rev. Stats. Ohio, ch. 4.
Randall v. *Howard*, 2 Black, 585, 587.
Spencer v. *Lawton*, 14 R.I. 494.

A mere glance at the scheme for reorganization submitted

is sufficient to show that if there were nothing more definite in the minds of the parties than an understanding that some such plan was to be submitted, the court, if it interferes, will have to make a contract for the parties before it can enforce one. The fact that a plan of reorganization was to be submitted for consideration, refutes the idea that any had been agreed upon, and, coupled with the absence of any definite allegation in the complainant's bill of the essential terms of such an agreement, shows that the alleged agreement was but an arrangement of a mere honorary nature; and of such no specific performance can be had.

Fry on Spec. Perf. sec. 264.

The parties are left to their common law rights, if any.

Id. sec. 269, and cases.

The complainant himself speaks of the alleged agreement at one place in his bill as "*negotiations which were pending between said committees.*" (Record, p. 6, par. 2.)

The court will carry into effect a contract framed in general terms, when the law will supply the details; but if any details are to be supplied in modes which connot be adopted by the court, there is then no concluded contract capable of being enforced.

Id. sec. 349, and cases.
Id. sec. 361, *n.* (I).

If the agreement be vague, uncertain, and undefined, or any terms be left in doubt or uncertainty, a court of equity will not enforce it.

Bispham's Eq. sec. 377.
Walpole v. *Oxford*, 3 Ves. p. 420.
Aday v. *Echols*, 18 Ala. 353.

Colson v. *Thompson*, 2 Wheat. 336.
Schmeling v. *Kniesel*, 45 Wis. 325.

There was no mutuality in the character of the alleged agreement. A contract which is sought to be enforced must be mutual, both as to the remedy and the obligation.

"To entitle a party to a specific performance, the agreement which is sought to be enforced must not only be certain in its terms, but there must be mutuality in its character; both of which requisites appear to be wanting here."

German v. *Machin*, 6 Paige Ch. 287, and cases.
Bronson v. *Cahill*, 4 McLean, p. 21.
Benedict v. *Lynch*, 1 Johns. Ch. 282.
Fry on Spec. Perf. sec. 440, and cases.

Finally, we call the attention of the court to the scheme submitted, in "Exhibit F," as showing what the income bondholders thought might be in accord with the agreement between the two committees; and add this only, that if the first mortgage bondholders were willing to abide by the alleged agreement, they certainly would not think such a plan would be a proper way to carry it out. It is admitted by the refusal of the complainant to offer to redeem that the road is not worth $500,000. The plan contemplates putting at least $1,225,000 securities upon it, more than a million of which are to be in the form of bonds, and more than a half million in first mortgage bonds. There is no reason for such a scheme, and it can serve no honest purpose and no purpose whatever but to give the complainant a lot of false pretences of value. Wherefore, admitting the agreement, but not assenting to this scheme as embodying it, suppose we allow the bill to be taken *pro confesso*, as we have a right to do, can we ask the ingenuity of this court to formulate a

scheme of reorganization to which the court thinks these parties should be bound?

(*d*) *For that no consideration is alleged for said contract; nor is the same alleged to be in such form as imports consideration.*

The fact that it was not in writing forbids that it was under seal.

The older cases, contrary to modern decisions, held mere inadequacy of consideration to be a good defence. (See Fry on Spec. Perf. secs. 423, 424.) But early and late decisions agree in holding want of consideration a perfect defence. Equity does not decree the specific performance of incomplete gifts.

Callaghan v. *Callaghan*, 8 Cl. & Fin. 374.
Crawford v. *Manson* (Ga.), 8 S.E. 54.
Anson v. *Townsend*, 73 Cal. 415.

The court of chancery will not aid a party who is seeking the specific performance of a mere voluntary agreement which is neither founded upon a good nor a valuable consideration.

Acker v. *Phoenix*, 4 Paige Ch. 305, and cases.

It may be said that the complainant does not seek to have the alleged agreement specifically enforced as a contract, but as a trust: for in the prayer of his bill he asks that both the sale to the committee of first mortgage bondholders and the sale to the Iron Railway Company may be "*rescinded or* so far qualified that it may be *declared to be in trust* for both classes of bondholders." (Record, p. 8.) But the appellant's position is no better to have the alleged agreement enforced as a trust than as a

contract. A *voluntary trust* which is still executory, incomplete, imperfect, or promissory, will not be enforced or aided.

See cases cited in 3 N.Y. Ch. (Law ed.) p. 447.

(*e*) *For that said committee and board of trustees were not authorized to make or conclude any such agreement to or with the income bondholders of said railroad as is alleged in said complaint.*

This fact conclusively appears in the articles of the association of the first mortgage bondholders constituting their committee and board of trustees and limiting their power, which the complainant quotes (p. 5) and upon which alone he relies.

NOR FOR AWARDING DAMAGES.

Having thus submitted the argument against specific performance, we return to the second proposition in the fifth cause of demurrer, subdivision *c*, that the court ought not to retain jurisdiction to award damages, if any.

As the Circuit Court had no jurisdiction on the ground of enforcing specific performance of a contract, it ought not to have and did not retain jurisdiction for the sole purpose of awarding damages, which could be the subject only of an action at law.

Hatch v. *Cobb*, 4 Johns. Ch. pp. 560–561.
Kempshall v. *Stone*, 5 Johns. Ch. 193.
See also *Sands* v. *Thompson*, 43 Ind. 24.
Milkman v. *Ordway*, 106 Mass. 256.

Damages are given, in addition to or in lieu of specific performance, only when the complainant had a case for specific performance at the time of bringing his bill.

Fry on Spec. Perf. sec. 1266 and cases, sec. 1271 and cases.

Morss v. *Elmendorf*, 11 Paige Ch. 278.

Smith v. *Kelley*, 56 Me. 64.

5 N.Y. Ch. (Law ed.) p. 136, *n.*

The indefiniteness and want of conclusion which forbids the enforcement of the alleged contract also prevents recovery of damages for any alleged breach of it; for the establishment of a contract must precede the breach of it. The complainant's real grievance is his disappointment that no agreement was made. If he sustained legal injury from this cause, there may be a personal action against the committee of first mortgage bondholders, but it affords no ground for this proceeding.

Again, there are no damages, as appears by the bill itself; for the bill both distinctly maintains that the foreclosure was void and alleges that any foreclosure against any income mortgage is impossible.

There could, therefore, be neither a foundation for an agreement to share in the benefits of such foreclosure, nor damage for breach of it.

Sixth. For that said alleged agreement and this suit admit the competency of the defendant's organization; that said agreement and alleged authority therefor do not appear to be competent to create any privity with or liability to said complainant on the part of this defendant and its stockholders.

This ought sufficiently to appear from the papers themselves.

Seventh. (*Substantially the same as sixth in the demurrer of Coombs.*) *That it does not appear that John C. Coombs,*

one of the defendants named in said bill, the purchaser conveying the railroad to the Iron Railway Company, was in privity with or incurred any obligation or liability to said complainant or any of said income bondholders, or was served with any notice or had any knowledge of any undertaking in behalf of the income bondholders of said Iron Railway Company, or of any violation of any such undertaking, and no fraud or knowledge or complicity in any fraud on the part of said Coombs, is sufficiently alleged in said bll.

It will be noticed that it is not alleged that said Coombs was present at said alleged agreement between the two committees, or that he had any notice of it, or that the complainant or income bondholders ever had any connection with him, or served any notice upon him, or that he represented them in any respect; but only that the complainant assumed, and, as he says, had reason to believe, that Coombs purchased for the benefit of both classes of security holders; but he does not charge Coombs as the source of his reason for such belief. All that need be said upon this is, that if Coombs was a mere instrument of the committee and board of trustees of the first mortgage bondholders, then they are necessary parties with, if not indeed instead of, himself, while if he is not identical and could acquire any other or different rights, or was free from their obligations, there is no case alleged against him by which his purchase should be affected.

Eighth. For that it is alleged in said bill that no foreclosure proceedings can under any circumstances bar income bondholders from the net profits and income after the payment of interest on first mortgage bonds.

This the complainant emphatically affirms (p. 8, par. 1). This has already been briefly considered herein. It is a

startling proposition; and, if true, it is the end of the bill. Assuming it to be true, the complainant has no equity in the first aspect of his bill to have the decree set aside, because it has not affected him; and in the second aspect, his prayer that the purchasers be charged with a trust to reorganize in such manner as would place him right where he was before, is a thing accomplished.

This proposition, though certainly not in accord with the general understanding of the legal status of income bondholders, may nevertheless be thought to be true, because of the fact of some law in Ohio upon which the complainant may rely, but which does not appear. Wherefore it cannot be dismissed as idle, and the complainant is bound by it on demurrer.

Ninth. For the recovery of any property formerly of said Iron Railroad Company which may not have been covered by the first mortgage thereon, but which may have been covered by said second mortgage, as alleged in said bill, it appears that the parties in interest have a plain, adequate, and complete remedy at law, if any litigation in relation thereto may be necessary, which does not appear.

This bill could not be maintained to recover such property, even though there were no plain, adequate, and complete remedy at law. There is no description of it so that it could be followed in equity. The court could not make any decree for its recovery if the defendants should allow the bill to be taken *pro confesso*.

> See *Huntington* v. *Saunders*, 120 U.S. (30 Law ed. 580) 78.

It is apparently a matter wholly within the knowledge of

the complainant, the court is not advised and the complainant seeks no discovery concerning it.

It has already appeared that if there be any such property and it be sought in this bill, then the bill is clearly multifarious. If the allegation refers to income above interest applicable to first mortgage bonds and which the complainant seeks to have refunded from the consolidated companies, it has already been considered. The allegation in the bill concerning it is on page 7, par. 5, wherein it is not alleged that the Iron Railway Company or John C. Coombs claim such property; but only that the committee of first mortgage bondholders claim and that it is claimed (it does not say by whom) that such property was conveyed to the Iron Railway Company. It is not charged that the Iron Railway Company has it. And the only parties charged with having it are not parties to the bill. No such property is specified—a reference to the two mortgages annexed as exhibits does not disclose any such — and no special relief is prayed for in respect of it.

JOHN C. COOMBS,
CHAS. H. HANSON,
Attorneys for Appellees.

April 29. 1890

135-53

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

No. 306.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN E. LIGGETT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MARCH 19, 1887.

Glenn vs Liggett

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 13, 1889

1 The United States of America to John E. Liggett, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein John Glenn, trustee of the National Express and Transportation Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 13th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

[Endorsed:] 2674. United States circuit court, eastern district of Missouri. John Glenn, trustee of the National Express and Transportation Company, *vs.* John E. Liggett. Citation. Filed Dec. 13, 1886. A. P. Selby, clerk.

I accept service of this citation.
St. Louis, Dec. 22nd, 1886.

SMITH & HARRISON,
Att'ys for John E. Liggett.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1886, thereof, between John Glenn, trustee of the National Express and Transportation Company, plaintiff, and John E. Liggett, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—
SAMUEL TREAT, *District Judge.*

[Endorsed:] No. 2674. United States circuit court, eastern district of Missouri. John Glenn, trustee, *vs.* John E. Liggett. Writ of error to the circuit court of the U. S., eastern dist. of Missouri. Returned and filed 13th day of Dec., 1886. A. P. Selby, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the commaud of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this 14th day of March, A. D. 1887.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

3 *Amended Petition.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said District.

Be it remembered that on the fourteenth day of December, A. D. 1886, there was filed in said court a certain amended petition in words and figures following, to wit:

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the Circuit Court.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
JOHN E. LIGGETT, Defendant.

The plaintiff, a citizen of the State of Maryland, complains of the

defendant, citizen of the State of Missouri, and for cause of action states that the defendant heretofore subscribed for sixty-three shares of the capital stock of the National Express and Transportation Company, a body corporate of the State of Viginia, duly incorporated under the laws thereof, pursuant to an act of the General Assembly of said State, approved December 12, 1865, entitled "An act to amend and re-enact an act to incorporate the Southern Express Company, passed March 12, 1861, and to incorporate the National Express and Transportation Company," and thereby agreed to be liable to said company and undertook and
4 promised to pay said company for each and every share so subscribed for by said defendant the sum of one hundred dollars, in such installments and at such times as said defendant might be lawfully called upon and required to pay the same, according to the legal tenor and effect of the laws under which said company was so incorporated and said subscription to said stock made by said defendant, whereby and by force of said subscription said defendant became and was received and admitted as a stockholder in said company, and undertook and agreed to sue and be sued, implead and be impleaded, contract and be contracted with in said corporate name, as to all matters touching and affecting the property, rights, and obligations of said corporation.

And plaintiff further says that on the twentieth day of September, 1866, the said National Express and Transportation Company, having become insolvent, by its deed of that date, duly executed, acknowledged, and recorded, assigned and transferred to John Blair Hoge and C. Oliver O'Donnel, both citizens of the State of Maryland, and John J. Kelly, a citizen of the State of New York, in trust for the benefit of the creditors of said company, all its property, rights, credits, and effects of every kind, in trust, to collect all the debts, claims, and moneys payable, to reduce the same to money, and to apply the proceeds thereof to the trusts declared by said deed, including the trust therein declared for the payment of the debts of said company, in the order of priority therein provided, and to employ agents, clerks, counsel, attorneys, and servants for the proper execution of the said trusts, and shortly thereafter ceased to do business and the defendant assented and agreed to the said deed of trust, and thereby became bound and undertook and promised to pay to said trustees for each and every share of stock so as above stated, subscribed for by him, the balance of
5 the one hundred dollars due on each share of stock uncalled for at the time of the making of said trust deed, whenever the said defendant might be lawfully called upon to pay the same according to the legal tenor and effect of the laws under which said company was so incorporated and said subscription to said stock made.

And plaintiff further says that at the time of the execution and delivery of said deed of trust the said company had called for and required to be paid by the person legally bound to pay therefor, including the defendant, only a part, to wit, 20 per cent., of the par value of said stock, and had suffered and permitted the residue of said par value of said stock to remain uncalled for in the hands of

the persons legally liable to pay for the same, including the defendant, which said balance of 80 per cent. remained in the hands of said persons, including said defendant, to be paid by them to said company as and when the same should be required to be paid, according to the terms of the subscription therefor and the laws of the State of Virginia applicable to said contracts of subscription.

And the plaintiff further says that the trustees so appointed by said deed failed and neglected to perform the trusts thereby created, and the validity and effect of said deed were drawn in question in the courts of various States in which the stockholders of said company resided, and the enforcement thereof was thereby greatly retarded and hindered; and he further says that afterwards, in November, 1871, one William W. Glenn, of the city of Baltimore, being a judgment creditor of said company for a large amount, filed a bill in the chancery court of the city of Richmond, being a court of competent jurisdiction in such cases, in his own behalf and in behalf of all other creditors of said corporation, against said National Express and Transportation Company and certain of its officers
6 and against the trustees named in said deed of trust as defendants, by which bill of complaint it was, among other things, sought to obtain from said court a judicial determination of the validity of said deed and a judicial construction thereof and the establishment of the legal effect and obligation of the same upon all property, rights, and persons affected thereby, and also to enforce the trusts thereby declared in favor of the creditors of said corporation; that pending said bill said W. W. Glenn died, and in the year 1879 the suit was revived in the name of John W. Wright, sheriff of the said city of Richmond, and as such duly constituted official administrator of said W. W. Glenn; that after such revivor an amended bill was filed, to which bill the said National Express and Transportation Company, certain of its officers, and the said Hoge and Kelly were made defendants (the said O'Donnell having in the meantime died); that by said bill it was sought to obtain in addition to the relief prayed for in the original bill an account and establishments of the debts due by said company and secured by said deed of trust and an account of the property and estate subject to the terms of said deed, including the amount of capital stock yet remaining unpaid by the holders thereof and uncalled by said company and subject to be applied to the payment of the debts of said company; the removal of said surviving trustees and the appointment of a new trustee or trustees in their room, and an assessment or call to be made by the court upon the uncalled and unpaid capital stock and the persons liable to pay the same, for the purpose of providing means to pay the debts of said corporation and for other appropriate relief.

And the plaintiff further says that said company was duly served with process in said cause in accordance with the laws and practice of the State of Virginia; certain of its officers were sum-
7 moned and the said surviving trustees appeared voluntarily to said suit and answered said original and amended bills,

whereby said court acquired full jurisdiction to decree as to all the matters and things involved in said suit.

And the plaintiff further says that such proceedings were had in said cause that on the 14th day of December, 1880, the said court did, among other things, adjudge, order, and decree as follows—that is to say:

1. That the said deed of trust of September 20, 1866, was a good and valid deed under the laws of the State of Virginia and binding upon the said corporation by which the same was executed.

2. That at the time of the execution of said deed the said corporation had called for twenty per cent. of the amount payable by the subscribers to and holders of its capital stock, and that eighty per cent. of said amount, being eighty dollars on each share of stock, remained unpaid and uncalled at the date of said decree and subject to be applied to the payment of the debts of said corporation secured by said deed of trust.

3. That the right to receive said unpaid and uncalled eighty per cent. of said capital stock from the persons liable to pay the same as and when the same should become payable by the terms of the contract between said company and the subscribers to and holders of its stock was vested by the said deed in the said trustees and the survivors of them, to be applied when so collected to the payment of the debts secured by said deed.

4. That said unpaid and unsettled eighty dollars per share was by the terms of the contract between said company and the persons liable to pay the same payable only in such amounts and at such times as the same might be required to be paid by said company, through its president and board of directors, and that no
8 power or authority to sue for same or any part thereof was vested in said company or in said trustees under said deed of trust unless and until such call should first be made by said corporation, and that the said trustees acquired no authority or power to make such call by force of said deed of trust or otherwise.

5. That there was no property or estate of said company wherewith to pay its debts, save and except the amount so remaining unpaid and uncalled of its capital stock, and that it was the duty of the proper officers of said corporation to call upon the persons liable therefor to pay a sufficient amount of said unpaid and uncalled eighty dollars per share to carry out the trusts of said deed and pay the creditors secured thereby, but that said corporation and its proper officers had for many years wrongfully neglected and failed to make such call or assessment.

6. That the said unpaid and uncalled eighty dollars per share of said capital stock remaining in the hands of the holders thereof constituted a trust fund for the payment of the creditors of said company under said deed of trust, and that by reason of the neglect and failure of said corporation to call for the payment of a sufficient amount thereof to satisfy its debts and obligations under said deed of trust, and thereby enable said trustees to sue for and recover the amount so called, the said court possessed and would exercise said

power and would call for so much of said unpaid and uncalled amount as would be necessary to perform the trusts declared by said deed and pay the debts secured thereby.

7. That the said surviving trustees should be, and they were by the said decree, removed, and that the plaintiff should be, and he was by said decree, appointed in their room and stead to execute the trusts of said deed.

9 8. That there were numerous debts due and owing by said company and entitled to be paid under said deed of trust, amounting in the aggregate to $509.392.41, each of which debts was particularly ascertained and ordered by said decree to be paid.

And it was further adjudged, ordered, and decreed that it was necessary and proper that thirty per cent. of the par value of each share of said stock should be called for and required to be paid by the subscriber therefor and their assigns for the purpose of paying the debts of said company, under the provisions of said deed of trust; and it was accordingly adjudged, ordered, and decreed by said court in said cause that a call and assessment be, and the same was thereby, made upon the stock and stockholders of said company and their assigns of thirty per centum of the par value of said stock, being thirty dollars on each and every share thereof, the same when paid to be paid to and received by the said plaintiff, as trustee under said deed, in the room and stead of the original trustees therein named.

And the plaintiff further says that he accepted the appointment so made by said decree and complied with the terms and conditions thereof, and was and is duly qualified to act as such substituted trustee and to have the rights and perform the duties conferred upon and required of him by said decree.

And he further says by force of said decree and of the statute of the State of Virginia in such case made and provided, upon accepting such appointment as trustee and qualifying as such as required by said decree, he, the said plaintiff, then and there became and was and still is substituted to all the rights, powers, duties, and responsibilities of the trustees named in said deed of trust, and became and was and still is lawfully entitled to receive and collect the said assessment or call of thirty dollars per share on each and

10 every share of stock of said company from the persons liable to pay the same.

And the plaintiff further says that it was further adjudged, ordered, and decreed that he, as such substituted trustee, be, and he was by said decree, authorized and directed to collect and receive the said call and assessment and to take such steps to that end as he should be advised.

And the plaintiff further says that by force of said contract of subscription to the stock of said company and said deed of trust and of said call and assessment so made by said decree and of the facts above stated the said defendant became and is indebted and liable to pay to him in the sum of eighteen hundred and ninety dollars, being the amount of thirty dollars on each of said shares of the stock of said company so as aforesaid subscribed for by said defendant;

and, being so liable to pay, the said defendant, in consideration thereof, promised to pay said sum to the plaintiff when thereto requested.

But he says that the defendant, although thereto requested, failed and refused to pay the same to the said plaintiff.

Plaintiff states that in the year 1884 he instituted suit in this court against defendant to enforce this liability; that on the 15th day of July, 1885, plaintiff suffered a nonsuit in said case.

Wherefore plaintiff prays judgment against defendant for the sum of eighteen hundred and ninety dollars, with interest from Dec. 14, 1880, and for his costs.

For another cause of action plaintiff states that the suit instituted in the chancery court of the city of Richmond as aforesaid was after the 14th day of December, 1880, transferred to the circuit court of the county of Henrico, in the State of Virginia, a court of
11 competent jurisdiction, and that such further steps were therein taken that on the 26th day of March, 1886, a further decree was entered in said cause adjudging that for the payment of a large balance of the indebtedness of said company so established as aforesaid it was necessary and proper to make a call for the residue of fifty per cent. remaining uncalled for and unpaid upon the capital stock of said company, and ordering and decreeing that a call and assessment be made, and the same was thereby made, upon the capital stock and the stockholders of said company of fifty dollars on each and every share thereof, and requiring the stockholders of said company and each and every of them and their legal representatives and assigns to pay the several amounts thereby called for to this plaintiff, and authorizing and requiring this plaintiff to collect and receive said call and assessment and to take such prompt steps toward that end by suit or otherwise and in such jurisdictions as he might be advised.

Plaintiff further states that by reason of defendant's ownership of stock in said company as hereinabove stated and by virtue of the decree last mentioned defendant became and is bound to pay the plaintiff the sum of thirty-one hundred and fifty dollars with interest from March 26th, 1886, at the rate of six per cent. per annum. Wherefore plaintiff prays judgment for said sum, with interest, and for the cost of this suit.

T. K. SKINKER,
Attorney for Plaintiff.

And afterwards, to wit, on the fourteenth day of December, A. D. 1886, there was filed in said cause a demurrer in words and figures following, to wit:

12 *Demurrer.*

UNITED STATES OF AMERICA,
Eastern District of Missouri.

In the Circuit Court of the United States within and for said District.

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,
vs.
JOHN E. LIGGETT, Def't.

And now at this day comes the defendant, John E. Liggett, and demurs to the amended petition of plaintiff in this cause and states as the grounds of his demurrer—

First. That said amended petition does not state facts sufficient to constitute any cause of action or causes of action against this defendant.

Second. That it appears from the face of said amended petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said amended petition at any time within ten years next before the commencement of this suit.

Third. That it appears upon the face of said amended petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the second count of said amended petition at any time within ten — next before the commencement of this suit.

Fourth. That it appears upon the face of said amended petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said amended petition at any time within five (5) years next before the commencement of this suit.

13 Fifth. That it appears upon the face of said amended petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the second count of said amended petition at any time within five years next before the commencement of this suit.

Sixth. That it appears upon the face of said amended petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said amended petition at any time within ten years next before the commencement of the suit in which plaintiff alleges that he suffered a nonsuit.

Seventh. That it appears upan the face of said amended petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said amended petition at any time within five years next before the commencement of this suit in which plaintiff alleges he suffered a nonsuit.

Eighth. That it appears upon the face of said amended petition that both of the pretended causes of action attempted to be set forth

in said amended petition are barred by the statute of limitations of the State of Missouri.

Ninth. That the chancery court of Richmond had no jurisdiction to make the assessment alleged in the petition, and that both that assessment and the further assessment alleged in the petition were and are void.

SMITH & HARRISON,
Attorneys for the Defendant.

And afterwards, to wit, on the said fourteenth day of December, A. D. 1886, the following, among other, proceedings were had and appear of record in said cause, to wit:

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
JOHN E. LIGGETT, Defendant. } 2674.

14 *Demurrer Sustained.*

Now come the parties, by their attorneys, the plaintiff by T. K. Skinker and the defendant by Smith and Harrison, and by consent the judgment entered herein on November 3rd, 1886, is set aside; and thereupon the plaintiff, by consent, files amended petition, to which defendant files demurrer, and the court, having considered said demurrer to amended petition, finds the law thereon for the defendant and orders that the same be sustained, and, the plaintiff electing to abide by his said amended petition, it is ordered by the court that judgment be now entered upon said demurrer for defendant.

Judgment.

It is therefore considered by the court that the plaintiff take nothing by this writ herein; that the defendant, John E. Liggett, go hence without day and have and recover of the said plaintiff, John Glenn, trustee of the National Express and Transportation Company, his costs in this behalf expended, and that a fee bill or execution issue therefor.

Writ of Error Allowed.

And thereupon the plaintiff by attorney presents to the court a writ of error to remove this cause to the Supreme Court of the United States and a citation citing and admonishing the said defendant to be and appear at a Supreme Court of the United States on the first day of the next term thereof to be begun and held at Washington, D. C., on the second Monday of October next; which said writ of error is allowed and said citation signed by the judge; and said plaintiff also presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein.

Said appeal bond is in words and figures following, to wit:

15 Know all men by these presents that we, John Glenn, as principal, and James M. Carpenter, as surety, are held and firmly bound unto John E. Liggett in the full and just sum of five hundred dollars, to be paid to the said John E. Liggett, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at the September term, 1886, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between John Glenn, trustee of the National Express and Transportation Company, plaintiff, and John E. Liggett, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said defendant, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOHN GLENN,
By T. K. SKINKER,
His Attorney. [SEAL.]

JAS. M. CARPENTER. [SEAL.]

Approved by—

SAMUEL TREAT, *Dist. Judge.*

[Endorsed:] No. 2674. United States circuit court, eastern district of Missouri. John Glenn, trustee, *vs.* John E. Liggett. Bond, $500.00. John Glenn, principal; James M. Carpenter, surety. Filed 14th day of Dec., 1886. A. P. Selby, clerk.

16 UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2673, of John Glenn, trustee of the National Express and Transportation Company, plaintiff, against John E. Liggett, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the

Seal of the United States Circuit Court, Eastern District of Missouri.

seal of said court, at office, in the city of St. Louis, in said district, this second day of February, in the year of our Lord eighteen hundred and eighty-seven.

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2674. United States circuit court, eastern district of Missouri. John Glenn, trustee, against John E. Liggett. Duly certified transcript of the record and proceedings in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 306. John Glenn, trustee of the National Express and Transportation Company, plaintiff in error, *vs.* John E. Liggett. Filed March 19, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff in Error,
vs.
JOHN E. LIGGETT. } No. 306.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for the Eastern Division of said Judicial District.

Be it remembered that on the twelfth day of July, A. D. 1886, there was filed in the circuit court of the United States for the eastern district of Missouri a certain petition in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
JOHN E. LIGGETT, Defendant.

The plaintiff, a citizen of the State of Maryland, complains of the defendant, a citizen of the State of Missouri, and for cause of action states that in the year 1865 the General Assembly of the State of Virginia passed an act, approved December 12th, 1865, entitled "An act to amend and re-enact an act to incorporate the Southern Express Company, passed March 22, 1861, and to incorporate the National Express and Transportation Company;" that by said act it was, among other things, provided that Joseph E. Johnston and other persons therein named, together with their associates, successors, and assigns, were, and they were declared to be, a body corporate and politic, by the name of the National Express and Transportation Company, sometimes called the National Express Company, for the purpose of an express and transportation business, and as such should have perpetual succession and might sue and be sued, implead and be impleaded, contract and be contracted with; and it was further provided that the capital stock of said company should be $5,000,000 (with the privilege of increasing the same to a sum not exceeding $10,000,000), to be divided into shares of $100 each, and that the

principal office of said company should be kept at the city of Richmond, in the State of Virginia.

Plaintiff further states that in the year 1865 defendant became and was the holder by assignment of sixty-three shares of stock in said company, and was accepted by said company as such, and that said shares, on the 14th day of December, 1880, and before and ever since that date, have stood on the books of said company in the name of defendant; that by so subscribing and holding said shares defendant agreed and bound himself, his heirs and legal representatives, to pay to said company, as he or they should be thereunto required by said company and the president and directors thereof or other lawful authority, the sum of one hundred dollars for each of said shares.

Plaintiff states that said company was duly organized under said act and entered upon the transaction of business, with its principal office in said city of Richmond, and that afterwards, having become embarrassed in its affairs, on the 20th day of September, 1866, said company executed a deed of trust, whereby it granted and conveyed to John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell all its estate, property, rights, and credits of every kind, including all effects and moneys payable to said company, whether on calls or assessments on stock of the company or on notes or otherwise, in trust that the said grantees should collect and dispose of said assets and apply the net proceeds thereof to the payment of the debts of said company.

Plaintiff states that after the execution of said deed one William W. Glenn, a judgment creditor of said company, on behalf of himself and of such other creditors as should choose to be made parties thereto, brought his bill in the chancery court of said city of Richmond, a court of competent jurisdiction, invested by law with all the powers usually possessed by a court of chancery, against the said National Express and Transportation Company and said Hoge, Kelly, and O'Donnell and other persons, officers and directors of said company, the general nature and object of which bill was to cause an account to be taken of the indebtedness of said company to said William W. Glenn and all its other creditors, to ascertain and settle the validity, scope, and effect of said deed and the powers, duties, and rights of said trustees thereunder, and especially to ascertain and determine whether the unpaid or uncalled stockholders' liability passed by it to said trustees and was to be collected by them, and, if said deed should be held valid, to decree the execution of the trusts thereof; to remove the said trustees and to substitute some other persons or person in the execution of said trusts; to cause a call or assessment to be made upon and against the stockholders of said company, and to authorize and require the said trustees or their successors or successor to collect such assessment from said stockholders; that in said suit process was duly served on said company and on Hoge and Kelly (said O'Donnell having in the meantime departed this life), and said company and said Hoge and Kelly appeared to said suit; that such steps were afterwards taken therein that on the 14th day of December, 1880, a decree was entered in said

cause adjudging that under the laws of the State of Virginia said deed of trust was a good and valid conveyance; that its effect was to vest and that it did vest in said original trustees all the estate, property, rights, and credits of said company of every kind and wherever situated or being, including the credits allowed by statute and by said company to its stockholders for the uncalled and unpaid part of the several subscriptions to its capital stock and the right to receive and collect the same according to the terms of said contracts of subscription; removing said surviving trustees, Hoge and Kelly, from office and in their room and stead appointing the present plaintiff, John Glenn, as sole trustee, clothing him with all the rights and powers and charging him with the execution of the trusts of said deed to the same effect as were the said original trustees, and requiring him to give a bond, with sureties, in the sum of one hundred thousand dollars, for the faithful performance of his duties as such substituted trustee; establishing and allowing the claims of numerous creditors to the amount, including interest, of $509,392.41; finding that $20.00 per share and no more had been called by the board of directors on the stock of said company, and that $80.00 per share remained uncalled; that all calls made by the board of directors had either been exhausted or were then unavailable; that said company had no other assets for the payment of its debts; that the uncalled part of the subscriptions constituted a trust fund in the hands of the stockholders of said company for the benefit of its creditors; that it was necessary that 30 per cent. of said subscriptions should be called in order to meet the expenses of administering said trusts and paying the debts of said company; that said company had long ceased and abandoned its business, and that for about fourteen years there had been no meeting of its stockholders or board of directors; adjudging and making a call upon the stockholders of said company of thirty dollars per share of their stock; requiring said stockholders and each and every one of them and their legal representatives and assigns to pay to this plaintiff the amounts severally due from them under said call, and authorizing and directing this plaintiff to collect said call by suit or otherwise; and plaintiff states that he accepted said trust, and on the 3d day of January, 1881, qualified by giving bond as required by said decree.

Plaintiff states that by reason of defendant's ownership of stock in said company, as above stated, and by virtue of said decree he became and is bound to pay plaintiff the sum of eighteen hundred and ninety dollars, with interest from December 14th, 1880, at the rate of six per cent. per annum.

Plaintiff states that in the year 1884 he instituted suit in this court against defendant to enforce this liability; that on the 15th day of July, 1885, plaintiff suffered a nonsuit in said case. Wherefore plaintiff prays judgment against defendant for the sum of eighteen hundred and ninety dollars, with interest as aforesaid, and for his costs.

For another cause of action plaintiff states that the suit instituted in the chancery court of the city of Richmond, as aforesaid, was after the 14th day of December, 1880, transferred to the circuit court

of the county of Henrico, in the State of Virginia, a court of competent jurisdiction, and that such further steps were therein taken that on the 26th day of March, 1886, a further decree was entered in said cause adjudging that for the payment of a large balance of the indebtedness of said company so established as aforesaid it was necessary and proper to make a call for the residue of fifty per cent. remaining uncalled for and unpaid upon the capital stock of said company and ordering and decreeing that a call and assessment be made, and the same was thereby made, upon the capital stock and the stockholders of said company of fifty dollars on each and every share thereof, and requiring the stockholders of said company and each and every of them and their legal representatives and assigns to pay the several amounts thereby called for to this plaintiff, and authorizing and requiring this plaintiff to collect and receive said call and assessment, and to take such prompt steps toward that end by suit or otherwise and in such jurisdiction as he might be advised.

Plaintiff further states that by reason of defendant's ownership of stock in said company, as hereinabove stated, and by virtue of the decree last mentioned he became and is bound to pay to plaintiff the sum of thirty-one hundred and fifty dollars, with interest from March 26th, 1886, at the rate of six per cent. per annum. Wherefore plaintiff prays judgment for said sum, with interest, and for the costs of this suit.

T. K. SKINKER,
Attorney for Plaintiff.

Upon the filing of said petition there was issued out of the clerk's office of said court a writ of summons, which, with the marshal's return of service endorsed thereon, is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

In the Circuit Court of the United States in and for the Eastern Division of said District.

The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon John E. Liggett, a citizen of the State of Missouri, that he be and appear before the honorable circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for the eastern division of said district, on the third Monday of September next, then and there to answer the complaint of John Glenn, trustee of the National Express and Transportation Company, a citizen of the State of Maryland, as set forth in the petition filed in said court on the twelfth day of July, A. D. eighteen hundred and eighty-six.

Hereof fail not and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the twelfth day of July, A. D. eighteen hundred and eighty-six.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] A. P. SELBY, *Clerk.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

I hereby certify that I have executed this writ by delivering a true copy of said writ, with a copy of the complaint thereto attached, to the within-named defendant, John E. Liggett, on the 19th day of July, A. D. 1886, at St. Louis, in above district.

J. E. D. COUZINS,
U. S. Marshal, Eastern District of Missouri,
By JOHN E. COUZINS, *Deputy.*

And afterwards, to wit, on the twenty-first day of September, A. D. 1886, there was filed in said cause a demurrer to the petition in words and figures following, to wit:

Demurrer to Petition.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States within and for said District.

JOHN GLENN, Trustee, of the National Express and Transportation Company, Plaintiff,
vs.
JOHN E. LIGGETT, Defendant.

Now comes John E. Liggett, the above-named defendant, and demurs to the petition of plaintiff in this cause, and for grounds of demurrer states—

First. That said petition does not state facts sufficient to constitute any cause or causes of action against this defendant.

Second. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said petition at any time within ten years next before the commencement of this suit.

Third. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the second count of said petition at any time within ten years next before the commencement of this suit.

Fourth. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said petition at any time within five years next before the commencement of this suit.

Fifth. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the second count of said petition at any time within five years next before the commencement of this suit.

Sixth. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said petition at any time within ten years next before the commencement of the suit in which plaintiff alleges that he suffered a nonsuit.

Seventh. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said petition at any time within five years next before the commencement of the suit in which plaintiff alleges he suffered a nonsuit.

Eighth. That it appears upon the face of said petition that both of the pretended causes of action attempted to be set forth in said petition are barred by the statute of limitations of the State of Missouri.

SMITH & HARRISON,
Attorneys for Defendant.

And afterwards, to wit, on the twenty-seventh day of September, A. D. 1886, the following, among other, proceedings were had and appear of record in said cause, to wit:

(*Demurrer Submitted.*)

JOHN GLENN, Trustee, Plaintiff,
vs.
JOHN E. LIGGETT, Defendant. } 2674.

Now come the parties, by their attorneys, and the demurrer to the petition herein is argued by counsel and submitted, and by the court taken under advisement.

And afterwards, to wit, on the sixteenth day of October, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

(*Demurrer Sustained.*)

JOHN GLENN, Trustee, Plaintiff,
vs.
JOHN E. LIGGETT, Defendant. } 2674.

Now come the parties, by their attorneys, and the court, having considered the demurrer to petition heretofore submitted, finds the law thereon for the defendant and orders that said demurrer be, and the same is hereby, sustained.

And afterwards, to wit, on the third day of November, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

Judgment on Demurrer.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
JOHN E. LIGGETT, Defendant. } 2674.

Now again come the parties, by their attorneys—the plaintiff by T. K. Skinker and the defendant by Smith and Harrison—and, the demurrer to the petition having been heretofore sustained (the court being of opinion that the statute of limitations is a bar to this action) and the plaintiff electing to abide by his said petition, the court orders that judgment be now entered upon said demurrer for defendant.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, John E. Liggett, go hence without day and have and recover of the plaintiff, John Glenn, trustee of the National Express and Transportation Company, his costs herein expended and have thereof execution.

And thereupon the plaintiff, by attorney and by leave of court, files motion for a new trial.

And afterwards, to wit, on the fourteenth day of December, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
JOHN E. LIGGETT, Defendant. } 2674.

Now come the parties, by their attorneys—the plaintiff by T. K. Skinker and the defendant by Smith and Harrison—and by consent the judgment entered herein on November 3, 1886, is set aside; and thereupon the plaintiff, by consent, files amended petition, to which defendant files demurrer; and the court, having considered said demurrer to amended petition, finds the law thereon for the defendant and orders that the same be sustained; and, the plaintiff electing to abide by his said amended petition, it is ordered by the court that judgment be now entered upon said demurrer for defendant.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, John E. Liggett, go hence without day and have and recover of the said plaintiff, John Glenn, trustee of the National Express and Transportation Company, his costs in this behalf expended, and that a fee bill or execution issue therefor.

And thereupon the plaintiff, by attorney, presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendant to be and appear at a Supreme Court of the United States on the first day of the next term thereof, to be begun and held at